In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 313

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL RICE MILLING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR REHEARING

The gist of the argument for rehearing is that, since the refusal of even a single employee to cross a picket line is a "concerted" activity for "mutual aid or protection," safeguarded by Section 7, a union's inducement of such a refusal must necessarily be considered an invitation to engage in "a *concerted* refusal" to work within the meaning of Section 8 (b) (4). The parallel which petitioner postulates does not exist.

The Board agrees that the refusal of a single employee to cross a primary picket line is a *concerted* activity for mutual aid or protection, *Cyril*

de Cordova & Bro., 91 NLRB, No. 187, 26 LRRM 1628. In such a situation, concert exists between the worker who honors the picket line and the picketing worker who invites his aid by establishing the line. As between the picketer who invites such support and the worker who grants it by withholding his labor, "common cause" has been made, "and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts." Judge Learned Hand in *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503, 505-506 (C.A. 2). This "concert," which exists between the picket and those who refuse to cross the line, suffices to bring the conduct of both picket and employee within the language of Section 7. And since this concerted action is directed against the primary employer to the labor dispute who is being picketed rather than against the neutral employer whose employee approaches the picket line, it is "no more than was traditional and permissible in a primary strike." *National Labor Relations Board* v. *Denver Building Trades Council*, No. 393, this Term; see also, *Di Giorgio Fruit Corp.* v. *National Labor Relations Board* (App. D.C., No. 10605), decided June 21, 1951, slip op. p. 9.

The petition for rehearing overlooks the fact that the existence of "concert" in this sense is, however, irrelevant for the purpose of determining whether there has been a "concerted refusal" to work within the meaning of Section 8 (b) (4). To come within that Section there must be an inducement to "concerted action *by the customer's employees to force the customer to boycott the mill.*"

(*Denver* case, *supra*; italics added). Concert between the worker who pickets and the worker who respects the picket line is not "concert by the customer's employees." To meet this test there must be action in concert among the employees of the neutral employer, *i.e.*, those who approach the picket line. Normally, a picket does not ask the workers who approach a picket line to act in concert *vis-a-vis* each other. As this Court observed in the instant case, "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct *by such employees.*" (Italics added). There is, therefore, no inconsistency between finding, on the one hand, that "such employees" alone did not engage in a "concerted refusal" to work within the meaning of Section 8 (b)(4), but that, on the other hand, "such employees" together with the picketing workers, did engage in "concerted activities" within the meaning of Section 7.

Petitioner's argument thus tends to confirm rather than to impair the validity of the result reached by the Court in this case. For, since the refusal by workers to cross a primary picket line is activity which the statute specifically protects, it is hardly possible that Congress intended to condemn the inducement to engage in such a protected activity as a secondary boycott.

Accordingly, it is respectfully submitted that the petition for rehearing should be denied.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MOZART G. RATNER,
Assistant General Counsel,
BERNARD DUNAU,
Attorney,
National Labor Relations Board.

JUNE, 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 952308 914

BRIEF FOR THE N.L.R.B

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	3
I. The Board's findings of fact	4
II. The Board's conclusions and order	7
III. The decision below	10
Specification of errors to be urged	11
Summary of argument	12
Argument:	
Picketing of an employer at the situs of a labor dispute in which he is involved does not violate Section 8 (b) (4) (A) or (B) of the Act, although employees of neutral employers are induced thereby not to enter the primary employer's place of business	18
A. The statutory scheme envisions a distinction between primary and secondary labor action	26
1. The legislative history shows that Section 8 (b) (4) (A) and (B) was designed to eliminate union practices familiar to Congress as "secondary boycotts." The Section was not designed to curb primary strike pressure	26
2. The legislative history shows that Congress did not intend to impair the right of labor organizations to exert primary strike pressure in labor disputes	34
3. Together with the right to engage in primary strikes, Congress preserved the right to induce third parties to support such strikes by withholding their patronage or services from the primary employer at his place of business	38
B. Section 8 (b) (4) (A) and (B) must be read with the implicit condition that it prohibits secondary, but not primary, labor action	43
C. Picketing and allied inducement conducted at the premises of the primary employer is not within the ban of Section 8 (b) (4) (A) and (B)	45
D. Violence attending the inducement is immaterial to the question whether picket line activity is primary or secondary	63
E. The validity of a union's actions in relation to Section 8 (b) (4) (A) and (B) does not turn on whether the union meets the conditions prescribed by the proviso contained at the end of Section 8 (b) (4)	66
Conclusion	82
Appendix A	83
Appendix B	88

CITATIONS

Cases: Page

Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607 ..... 45, 82
Alamo Motor Lines, Inc. v. International Brotherhood of Teamsters, 229 S. W. 2d 112 58
Allen Bradley Co. v. Local Union No. 3, 145 F. 2d 215, reversed, 325 U. S. 797 28
American Federation of Labor v. Swing, 312 U. S. 321 ..... 46, 66
Anderson Sons Co. v. Teamsters Union, 26 LRRM 2368, decided May 1, 1950 34
Apex Hosiery Co. v. Leader, 310 U. S. 469 ..... 16, 22, 45, 66
Arkansas Express, Inc., 92 NLRB, No. 64, 27 LRRM 1077 30
Boyd v. Dodge, 234 S. W. 2d 204 ..... 58, 59
Building Service Union v. Gazzam, 339 U. S. 532 69
Cafeteria Employees Union v. Angelos, 320 U. S. 293 66
Carter Carburetor Corp. v. National Labor Relations Board, 140 F. 2d 714 77
Clopay Corp. v. Maser, 73 N. Y. S. 2d 126 58
Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 76
Consolidated Frame Co., 91 NLRB, No. 197, 27 LRRM 1068 30
Consolidated Realty Co. v. Dyers, Finishers and Bleachers Federation, 137 N. J. Eq. 412, 45 A. 2d 182 58
Conway's Express, 87 NLRB 972 30
Cyril de Cordova & Bro., 91 NLRB, No. 187, 26 LRRM 1626 81
Denver Building & Construction Trades Council v. National Labor Relations Board, ——F. 2d ——, certiorari granted No. 298, this Term 21, 43, 44
DiGiorgio Fruit Corp., 87 NLRB 720 ..... 34, 43
Douds v. Metropolitan Federation of Architects, 75 F. Supp 672 ..... 16, 20, 43, 44, 55, 61
Duparquet Co. v. Evans, 297 U. S. 216 23
Elliott v. Amalgamated Meat Cutters and Butcher Workmen, 91 F. Supp 690 61
Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 ..... 47, 61
Farmers Reservoir & Irrigation Co. v. McComb, 337 U. S. 755 44
Firth Carpet Co. v. National Labor Relations Board, 129 F. 2d 633 77
Grumman Co., 87 NLRB 755 45
Gruet Motor Car Co. v. Briner, 229 S. W. 2d 259 58
Gullett Gin Co. v. National Labor Relations Board, 179 F. 2d 499, reversed, Jan. 15, 1951 77
Guiseppi v. Walling, 144 F. 2d 608 44
Harrison v. Northern Trust Co., 317 U. S. 476 44
Ex parte Henry, 147 Tex. 315, 215 S. W. 2d 588 ..... 57, 58
Herzog v. Parsons, 181 F. 2d 781, certiorari denied, 340 U. S. 810 65
Holt v. Superior Court, 27 LRRM 2129 58
Hoover Co., 90 NLRB, No. 201, 26 LRRM 1365 30
Howland Dry Goods Co., 85 NLRB 1037 37
Humphrey v. International Brotherhood of Teamsters, 25 LRRM 2318, decided January 11, 1950 30
Interborough News Co., 90 NLRB, No. 297, 26 LRRM 1440 ..... 45, 48, 81
International Brotherhood of Electrical Workers v. National Labor Relations Board, 181 F. 2d 34, enforcing 82 NLRB 1028, certiorari granted, No. 108, this Term 12, 21, 24, 32, 42, 54
International Brotherhood of Teamsters v. Best Motor Lines, 229 S. W. 2d 912 58

Cases—Continued

	Page
International Longshoremen's & Warehousemen's Union, CIO, et al., 79 NLRB 1487	8
L. A. Young Spring & Wire Corp., 70 NLRB 968, enforcement denied, 163 F. 2d 905	49
Lanson Investment Co., 26 LRRM 1147	60
Louisville Gas Co. v. Coleman, 277 U. S. 32	62
Markham v. Cabell, 326 U. S. 404	44
Moore Drydock Co., 92 NLRB, No. 93	37, 47
National Labor Relations Board v. Denver Building & Construction Trades Council, No. 393, this Term	46
National Labor Relations Board v. Federbush Co., 121 F. 2d 954	23
National Labor Relations Board v. Fulton Bag & Cotton Mills, 175 F. 2d 675	64
National Labor Relations Board v. Greensboro Coca Cola Bottling Co., 180 F. 2d 240	77
National Labor Relations Board v. Hearst Publications, 322 U. S. 111	23, 25, 62
National Labor Relations Board v. Kennametal, Inc., 182 F. 2d 317	77
National Labor Relations Board v. Local 74, 181 F. 2d 136, enforcing 80 NLRB 533, certiorari granted, No. 55, this Term	33
National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333	22
National Labor Relations Board v. Wine, Liquor & Distillery Workers Union, 178 F. 2d 584, enforcing 78 NLRB 504	32
National Maritime Union, 78 NLRB 971, enforced, 175 F. 2d 686, certiorari denied, 338 U. S. 954	40
Northwestern Pacific Railroad Co. v. Lumber & Sawmill Workers' Union, 31 Cal. 2d 441, 189 P. 2d 277	58
Packard Motor Car Co., 61 NLRB 4, affirmed, 330 U. S. 485	49
Park & Tilford Import Corp. v. International Brotherhood, Local No. 348, 27 Cal. 2d 599, 165 P. 2d 901	62
Perry Norvell Co., 80 NLRB 325	14, 40, 64
Phelps-Dodge Corp. v. National Labor Relations Board, 313 U. S. 177	25
Printing Specialties & Paper Converters Union v. LeBaron, 171 F. 2d 331	16, 21, 48, 55
Pure Oil Co., 84 NLRB 315	8, 42, 45, 48
Ryan Construction Corp., 85 NLRB 417	45, 46
Santa Ana Lumber Co., 87 NLRB 937	30
Schatte v. International Alliance, 182 F. 2d 158, certiorari denied, 340 U. S. 827	30
Schultz Refrigerated Service, Inc., 87 NLRB 502	13, 15, 39, 45
Schiesra v. Long Island Lighting Co., 296 N. Y. 26, 69 N. E. 2d 283	58
Sterling Beverages, 90 NLRB, No. 75, 26 LRRM 1213	33, 62
Towne v. Eisner, 245 U. S. 418	119
United Auto Workers v. O'Brien, 339 U. S. 454	21, 38, 70, 80
United Auto Workers v. Wisconsin Employment Relations Board, 336 U. S. 245	43, 64
United Brewing Co. v. Beck, 200 Wash. 474, 93 P. 2d 772	56
United Brotherhood of Carpenters & Joiners v. Sperry, 170 F. 2d 963	21, 55
United Furniture Workers of America, et al., 81 NLRB 896	8
United States v. American Trucking Ass'ns., 310 U. S. 534	44
United States v. Dickerson, 310 U. S. 554	44

Cases—Continued Page

United States v. *Hutcheson*, 312 U. S. 219 45
United States v. *United Mine Workers*, 330 U. S. 258 44
Wadsworth Building Co., 81 NLRB 902, enforced, 184 F. 2d 60 ..... 28, 32, 64
Western Union Telegraph Co. v. *Lenroot*, 323 U. S. 490 70
Wright v. *Teamsters Union Local*, 33 Wash. 2d 905, 207 P. 2d 662 58

Statutes:

National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151 *et seq.*)
Section 2 (3) 22
Section 7 21
Section 8 (1) 34
Section 13 ..... 21, 43

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sup. 151, *et seq.*)
Section 2 (3) 22, 83
Section 2 (5) 77
Section 7 ..... 21, 39, 83
Section 8 (b) (1) 79, 83
Section 8 (b) (1) (A) 13, 22, 39
Section 8 (b) (2) 79
Section 8 (b) (3) 79
Section 8 (b) (4) 67, 84
Section 8 (b) (4) (A) .. 4, 12, 14, 17, 18, 20, 21, 29, 33, 67
Section 8 (b) (4) (B) 5, 14, 17, 18, 21, 33, 67
Section 8 (b) (4) (C) 22, 71, 72
Section 8 (b) (4) (D) 22
Section 8 (b) (5) 79
Section 8 (b) (6) 79
Section 8 (d) 22
Section 9 (a) 85
Section 10 (j) 65, 85
Section 10 (l) 65, 86
Section 13 ..... 21, 43, 87
Section 201 22
Section 202 22
Section 203 22
Section 204 22
Section 205 22
Section 206 22
Section 207 22
Section 208 22
Section 209 22
Section 210 22
Title IV, Section 402 (f) 72

Wisconsin Employment Peace Act, Sec. C. 111 (1949)
Section 111.02 (12) 59
Section 111.06 (2) (g) 59

Miscellaneous:

Barnard & Graham, *Labor and the Secondary Boycott*, 15 Wash. L. Rev. 137, 141, 144 (1940) 56

Committee Print, Joint Committee on Labor-Management Relations, Rep. No. 986, Part 3, 80th Cong., 2nd Sess., 70-71 .. 72

93 Cong. Rec. 136 71

93 Cong. Rec. 3834, 3835 in 2 Leg. Hist. 1005-07 ..... 13, 35

Miscellaneous—Continued

	Page
93 Cong. Rec. 3838 in 2 Leg. Hist. 1012	27, 29, 37
93 Cong. Rec. 4131, 4138, 4837-38, 4858, 4859, 4865, 5005, 5011, 5014, 6445-46, 7537, A. 2252, in 2 Leg. Hist. 1055, 1068, 1354-55, 1364, 1365, 1370-71, 1372-73, 1383, 1479, 1491, 1497, 1544, 1654, 1524	27, 38
93 Cong. Rec. 4198, in 2 Leg. Hist. 1106	12, 30
93 Cong. Rec. 4199, in 2 Leg. Hist. 1107	29, 30
93 Cong. Rec. 4436, in 2 Leg. Hist. 1206, 1207	14, 40
93 Cong. Rec. 4270-4271, in 2 Leg. Hist. 1138-39	40
93 Cong. Rec. 4020-21, 4435, in 2 Leg. Hist. 1023-25, 1205	40
93 Cong. Rec. 4430, 4431, in 2 Leg. Hist. 1195, 1197	40
93 Cong. Rec. 6859, in 2 Leg. Hist. 1623	41
93 Cong. Rec. 1844, in 2 Leg. Hist. 981-2	71
93 Cong. Rec. 1848, in 2 Leg. Hist. 986	71
93 Cong. Rec. 4905, in 2 Leg. Hist. 1455	71
Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., 14, 16	63
Frankfurter & Greene, *The Labor Injunction* (1930), pp. 35, 42, 43	53, 56, 57
5 Hearings before Committee on Education and Labor, House of Representatives, on Bills to Amend and Repeal the National Labor Relations Act, 80th Cong., 1st Sess., 3161-62	71
Hearings before Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong. 1st Sess., 176-177	28
4 Hearings before Committee on Labor and Public Welfare, United States Senate on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., 1905	71
Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 Yale L. Jour. 341 (1938)	55
Hellerstein, *Picketing Legislation and the Courts*, 10 Nor. Car. L. Rev. 158, 160 (1932)	59
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 43, in 1 Leg. Hist. 547	27, 34, 36
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 44, in 1 Leg. Hist. 548	71
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 59, in 1 Leg. Hist. 563	71
H. R. 3020, 80th Cong., 1st Sess.	
Sections 12, 2 (13)-(16), in 1 Leg. Hist. 204-207, 168-170	38
Section 12 (a) (1), in 1 Leg. Hist. 78, 204	42
Section 12 (a) (3) (c) (i), in 1 Leg. Hist. 79, 205	72
Section 12 (a) (3) (c) (ii), in 1 Leg. Hist. 205-206	72
H. Rep. No. 245, 80th Cong., 1st Sess., 23-24, 30, 43-44, in 1 Leg. Hist. 314-315, 321, 334-335	38, 40, 42, 71
Legislative History of the Labor Management Relations Act, 1947 (Gov't. Print. Off., 1948)	27
Petro, *Taft-Hartley and the "Secondary Boycott"*, 1 Labor Law Journal 835 (August 1950)	81
Petro, *The Enlightening Proviso*, 1 Labor Law Jour. 1075	78, 81
Restatement, Torts, Chapter 38, Topic 3, pp. 138-139 (1939); Sec. 779, Comment f; Vol. 4, p. 152; Sec. 785, Comment (b)	51, 56, 68
S. 249, 81st Cong., 1st Sess., Section 8 (b) (1), (January 31, 1949)	75
S. 360, 80th Cong., 1st Sess., Sections 13 (b) (1), 13 (b) (2) (January 27, 1947)	71, 73

Miscellaneous—Continued Page

S. Rep. No. 99, 81st Cong., 1st Sess., 59, 67-68, Minority Views, 29 76

S. Rep. No. 573, 74th Cong., 1st Sess., p. 9 34

S. Rep. No. 105, 80th Cong., 1st Sess., 7, 8, 22, 54, in 1 Leg. Hist. 413, 414, 428, 460 ..... 27, 34, 36, 71

Smith, *Coercion of Third Parties in Labor Disputes—The Secondary Boycott*, 1 La. L. Rev. 277, 286 (1939) 57

1 Teller, *Labor Disputes and Collective Bargaining*, 456 (1940) 57

Tower, *The Pussling Proviso*, 1 Labor Law Journal, 1019 (October 1950) 81

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 313

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL RICE MILLING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 89-96) is reported at 183 F. 2d 21. The findings of fact, conclusions of law, and order of the Board (R. 53-55, 56-85) are reported at 84 NLRB 360.

JURISDICTION

The judgment of the court below was entered on June 21, 1950. The petition for a writ of certiorari was filed on September 18, 1950, and was granted on December 11, 1950. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 8 (b) (4) (A) of the National Labor Relations Act makes it an unfair labor practice

for a labor organization to strike or to induce or encourage employees to strike or to engage in a concerted refusal to perform services for their employer, where an object thereof is to force the employer to cease doing business with any other person. Section 8 (b) (4) (B) of the Act makes similar conduct an unfair labor practice, where an object thereof is to require another employer to recognize or bargain with a labor organization which has not been certified under the provisions of Section 9 of the Act. The question presented is whether a labor organization, by picketing and allied means of inducement conducted at the employer's premises, in support of its demand to be recognized by that employer as bargaining agent, violates Section 8 (b) (4) (A), because its conduct induces employees of a neutral employer not to cross the picket line in the course of their employment; and whether, by its conduct, the labor organization, not having been certified as exclusive representative, also violates Section 8 (b) (4) (B) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp III, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 83-87.

STATEMENT

Upon charges filed by six Louisiana rice mills (R. 57; 10, 14, 17, 18),[1] the Acting Regional Director of the Board issued a complaint (R. 22-26) against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 201, A.F.L., hereafter called the "Union." In part, the complaint alleged that about September 5, 1947, the Union "called a strike of the employees" of Kaplan Rice Mills, Inc., "and placed and thereafter maintained a picket line around" its plant, "an object thereof being to force or require" Kaplan "to recognize or bargain" with the Union as the representative of its employees (R. 25).[2] It further alleged that,

[1] The charging parties, also the petitioners in the court below, consisted of the International Rice Milling Company, Inc., American Rice Milling Company, Inc., Louisiana State Rice Milling Company, Inc., Supreme Rice Mill, Loving Rice Mills, and Kaplan Rice Mills, Inc.

[2] The complaint also alleged that, in violation of Section 8 (b) (4) (A) and (B) of the Act, the Union, in the course of an organizational strike among the employees of the six rice mills, picketed the railroad servicing the mills and threatened the employees of those railroads with violence for dishonoring its picket lines, in an effort to force the railroads to cease transporting the goods of the rice mills (R. 25-26). The Board held that railroad employees are not "employees of any employer" within the meaning of Section 8 (b) (4) (A) and (B) whom unions are forbidden to induce to withhold services (R. 54-55). The court below reversed the Board's determination of this issue and remanded the case to the Board for further proceedings in conformity with the court's view that inducement of railroad employees is prohibited (R. 91-94, 96-97). The Board has not sought review of the holding of the court below on this point.

about October 21, 1947, the Union, "by . . . violence . . . and pickets, induced and encouraged the employees of The Sales House to engage in a concerted refusal in the course of their employment to transport or otherwise handle . . . commodities to or from the plant of Kaplan . . .," the object being "(1) to force or require . . . The Sales House . . . : to cease doing business with . . . Kaplan, and (2) to force or require . . . Kaplan . . . to recognize or bargain collectively" with the Union as the representative of its employees (R. 25-26). In its answer, the Union alleged, among other things, that it was engaged in "lawful primary strikes and picketing for organizational and recognition purposes, as authorized by the Act as amended" (R. 32). A hearing was held before a trial examiner of the Board, who on June 25, 1948, issued his intermediate report (R. 56-85). On June 20, 1949, the Board issued its decision and order dismissing the complaint (R. 53-56). The pertinent facts, as found by the Board, may be summarized as follows:

I. *The Board's Findings of Fact*

The Union began an organizational campaign among the employees of the six rice mills in November 1946 (R. 62), and in February 1947, the Union by letter requested each of the mills to recognize it as the collective bargaining representative of their employees (R. 62). In ensuing negotiations the mills requested the Union to es-

tablish proof of its majority claim (R. 62-63). The Kaplan Mill agreed to accept a card check as a means of establishing the Teamsters' majority status but the Union took no further steps to that end (R. 63). The Union failed to show that it represented a majority of the employees in any mill (R. 77-78 and n. 25); the mills did not recognize the Union as the collective bargaining representative (R. 63); and no proceedings were instituted before the Board to certify the Union as the statutory representative of the employees of the mills (R. 63).[3]

On September 3, 1947, pursuant to authorization previously given by its membership at a regular meeting, the Union instituted a strike to obtain recognition, which, by September 17, extended to all of the mills except Kaplan (R. 63).[4] Picket lines, patrolled by between one and four strikers, were established at all of the struck mills (R. 64). The pickets carried placards, each bearing one of the following legends and the name of the mill (R. 64):

> This is a picket line. Respect it. Do not cross it.

---

[3] No other union has been chosen by the employees to represent them, nor has the employer recognized any other bargaining agent.

[4] Less than a majority of the production and maintenance employees participated in the strike at each mill (R. 64). All the mills continued to operate throughout the strike at near, if not full, capacity and without any serious inconvenience (R. 64, 78).

This job is unfair to Local 201, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.

This job unfair tc organized labor.

High cost low pay blues.

About October 15, 1947, in the vicinity of the Kaplan mill, the Union placed a picket line on the passing tracks of the railroad serving Kaplan, although no strike had formally been called at Kaplan and none of the Kaplan employees was on strike (R. 65-67 and n. 10). About October 22 the Union began to picket the Kaplan mill proper (R. 67, n. 10). The pickets carried various signs, one being "This job unfair" to the Union (R. 67, n. 10).

On October 21, 1947, a truck of The Sales and Service House, driven by two employees of that firm, appeared at the Kaplan mill to obtain some rice or bran for Sales House (R. 69). The Sales and Service House is engaged in the business of selling feed and grain, and it purchases and handles goods, articles and commodities from the Kaplan Rice Mills (R. 61). As the Sales House truck was about to enter the Kaplan mill, pickets of the Union, stationed near the railroad tracks in the immediate vicinity of the mill, asked the drivers to stop (R. 69, Bd. Exh. 13, Tr. 173). The pickets, who formed a line across the road leading to the mill, told the truck drivers that "you can't go" into the mill because "we got a strike on" (R. 69).

The Sales House drivers agreed "to go back," and they returned to the highway where they stopped and were met by a representative of the Kaplan mill (R. 69). Together with the Kaplan mill representative, the drivers returned to the mill by another route. As they crossed the railroad tracks in the immediate vicinity of the mill and proceeded to enter, rocks were thrown at the trucks by the Union pickets (R. 69-70, Bd. Exh. 13, Tr. 173). The drivers nevertheless proceeded on to the mill (R. 70).

II. *The Board's Conclusions and Order*

On the basis of the foregoing facts, the Board concluded that the Union's conduct toward the Sales House employees did not violate Section 8 (b) (4) (A) and (B) of the Act, and accordingly it entered an order dismissing the complaint in this respect (R. 54-55). In reaching this conclusion, the Board stated that (R. 55):

> The [Union's] activities arose out of the *primary* picketing of the Kaplan mill, and were carried out in the immediate vicinity of that mill. Violence on the picket line is not to be condoned, but violence does not convert *primary* picketing into *secondary* action within the meaning of Section 8 (b) (4) (A) or (B).[8]

---

[8] In addition to stating that it did not condone the violence on the picket line, the Board said (R. 55):

> As the complaint herein does *not* allege restraint and coercion of employees in violation of Section 8

In explanation of its conclusions, the Board cited its earlier decision in *Pure Oil Company*, 84 NLRB 315 (R. 55, n. 2). In that case, in support of its strike against Standard Oil Company, "the Union posted pickets *at Standard Oil premises*, including the refinery and the entrances to the dock. The Union also sent letters to . . . [another union] stating in effect that the Standard Oil dock was 'hot'." (84 NLRB, at 317-318). Rejecting a contention that this action "was unlawful because it . . . induced the employees of Pure Oil [another employer] to engage in a concerted refusal to handle Pure Oil products at the dock, in order to force Pure Oil to cease doing business with Standard Oil," the Board explained that (84 NLRB, at 318-320):

> A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is

---

(b) (1) (A), we are not called upon to decide whether the Respondent's conduct toward the employees of the Sales House constituted a violation of that Section.

In other cases the Board has held that violence accompanying primary picketing is violative of Section 8 (b) (1) (A), *International Longshoremen's and Warehousemen's Union, CIO, et al.*, 79 NLRB 1487, 1504-1507; *United Furpiture Workers of America, et al.*, 81 NLRB 886. See also, *infra*, pp. 39-42, 63-66.

therefore proscribed by Section 8 (b) (4) (A) of the Act.

. . . Section 8 (b) (4) (A) was aimed at *secondary* and not primary action.

* * * * *

. . . the section does not outlaw any of the primary means which unions traditionally use to press their demands on employers. In this case the Union was making certain lawful demands on Standard Oil. It was pressing these demands, in part, by picketing the Standard Oil dock. As that picketing was confined to the immediate vicinity of Standard Oil premises we find that it constituted permissive primary action.

* * * * *

. . . The Union's letters were appeals to refuse to perform services only *at the Standard Oil dock*. . . . Like the picketing of the dock, therefore, the Union's letters must be viewed as an integral part of its lawful right to take primary action in support of its demands on Standard Oil, and to publicize this action. The appeals contained in the letters, no less than the appeals inherent in the picketing of the dock and in the signs which were posted adjacent to the picket line, thus amounted to nothing more than a request to respect a primary picket line *at the Employer's premises*. This is traditional primary strike action. . . .

. . . The fact that the Union's primary pressure on Standard Oil may have also had a

secondary effect, namely inducing and encouraging employees of other employers to cease doing business on Standard Oil premises, does not, in our opinion, convert lawful primary action into lawful secondary action within the meaning of Section 8 (b) (4) (A). To hold otherwise might well outlaw virtually every effective strike, for a consequence of all strikes is some interference with business relationships between the struck employer and others.

III. *The Decision Below*

On August 4, 1949, the six rice mills filed in the court below a petition to review the Board's order dismissing the complaint (R. 1-6). On June 21, 1950, the court below issued its opinion (R. 89-96), and on the same day entered its judgment (R. 96-97), in which it set aside the Board's order dismissing the complaint and remanded the cause to the Board for further proceedings in conformity with the court's opinion.

The court below held that the Union's conduct in inducing the Sales House employees to refuse to perform services for their employer at the Kaplan mill constituted an unfair labor practice within the meaning of Section 8 (b) (4) (A) and (B) of the Act. The court stated (R. 95):

> The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. If the

> union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true "secondary boycott" under the old common law or under any of the modern popular theories.

The court added (R. 96):

> The fact that [the Union's] activities occurred near the struck plant is not enough to draw such a distinction as the Board attempts to draw, especially where there is violence. * * * To allow the Board to rule such activity as prohibited by the statute not to be a violation thereof, simply because it occurred in the vicinity of the struck employer's plant, would render the section ineffective and insufficient.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that Section 8 (b) (4) (A) and (B) of the Act does not distinguish between primary labor action, which it permits, and secondary labor action, which it prohibits.

2. In holding that inducement of employees of a neutral employer by picketing and allied inducement conducted at the situs of the primary employer's place of business does not constitute primary labor action outside the purview of Section 8 (b) (4) (A) and (B).

3. In seemingly holding that violence as such is pertinent to a determination whether Section 8 (b) (4) (A) and (B) of the Act has been violated.

4. In setting aside the Board's order insofar as it dismissed that portion of the complaint which alleged that the Union's inducement of the Sales House employees not to enter the primary employer's premises constituted unfair labor practices within the meaning of Section 8 (b) (4) (A) and (B) of the Act.

SUMMARY OF ARGUMENT

A. The language of Section 8 (b) (4) (A) cannot properly be construed apart from other provisions of the Act. The literal interpretation adopted by the court has the effect of outlawing traditional primary labor pressures which the Act as a whole shows Congress intended to permit. Section 8 (b) (4) (A) reflects the fact that "Congress, in the search for a compromise between the conflicting interests of employees in collective bargaining and that of neutrals in avoiding involvements in quarrels not their own, decided to draw a line at secondary boycotts . . . ." Chief Judge Learned Hand, in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 40 (C. A. 2), certiorari granted, No. 108, this Term.

The purpose of Section 8 (b) (4) (A), as its legislative history shows, is to make it "unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." Senator Taft in 93 Cong. Rec. 4198, 2 Leg. Hist. 1106. As conceived by the proponents

of Section 8 (b) (4) (A), the gist of secondary activity is not the exertion of labor pressure, *i.e.*, strikes and picketing, at the original source of the dispute, but only extension of such pressures to other enterprises outside the primary center of controversy.

While it prohibited secondary pressure, Congress did not interfere with the exertion of primary labor pressure. Such pressure, designed to curtail the primary employer's business, Congress avowedly desired to permit and protect. As explained by Senator Taft, "secondary boycotts" are to be distinguished from "strikes for higher wages and hours and better working conditions, which are entirely proper." 93 Cong. Rec. 3834, 3835, in 2 Leg. Hist. 1005-07. The legislative history, as well as other provisions of the Act, also show that Congress deliberately refused to outlaw the primary organizational strike.

In preserving the primary strike, Congress also preserved the right to induce others to support the strike, for "Little indeed would be left of the right to strike . . . if the striking employees were denied the concomitant right of peacefully picketing the immediate business of their employer." *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, 504-505.

The only limitation Congress placed on primary picketing and allied means of inducement, as such, is the requirement of Section 8 (b) (1) (A) of the Act which, in prohibiting restraint and coercion

of employees by unions, prevents the use of "physical force, or threats of force, or of economic reprisal," in the conduct of "strikes and other organizational activities." *Perry Norvell Co.*, 80 NLRB 225, 239. Such abusive conduct aside, nothing in the Act is designed to "prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion." Senator Taft in 93 Cong. Rec. 4436, in 2 Leg. Hist. 1207.

B. Read *in vacuo*, without regard to the other provisions of the Act and to the legislative history which show that Congress did not intend to outlaw primary strike pressure, 8 (b) (4) (A) and (B) would prohibit primary labor action no less than secondary labor action. On the face of it, to forbid "a labor organization or its agents . . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . work . . . where an object thereof is . . . forcing or requiring . . . any employer or other person . . . to cease doing business with any other person," is to forbid all primary strikes, all primary picketing, and all related forms of inducement. Every primary strike has as "an object thereof" to cause the employer to "cease doing business" with another person and thereby to induce the employer to yield to a demand in order to avoid resulting economic loss through the disruption of his business relations. So too, and with the same end in view, all primary picketing and related induce-

ment, by urging the workers of a neutral employer not to enter the premises of the struck employer, has as "an object thereof" to "induce or encourage the employees of any employer to engage in . . . a concerted refusal in the course of their employment to . . . work."

But the provision must be read in conjunction with other provisions of the law which affirmatively recognize and protect the right to strike. To give literalism full sway "would destroy the Act by driving it to absurdity." Rifkind, J., in *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672, 675 (S. D. N. Y.). It is evident therefore that the language of Section 8 (b) (4) (A) and (B) "must be read with the implicit condition" that the labor action it proscribes is recourse to "secondary, but not primary means." *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, 504.

C. Preservation of a genuine opportunity for recourse to primary labor action, which Section 8 (b) (4) (A) and (B) does not affect, requires at its minimum that a primary strike or primary picketing and allied inducement conducted *at the premises* of the primary employer not be deemed a secondary boycott. To effectuate the policy of Congress, a union must be able to influence employees of a neutral employer who approach the primary employer's premises not to enter his premises, without thereby giving the picketing a secondary character. The ensuing interruption of the neutral employer's business is a consequence

against which 8 (b) (4) (A) and (B) may not be thought to guard, for the "reluctance of workers to cross a picket line is notorious" (*Printing Specialties and Paper Converters Union* v. *LeBaron*, 171 F. 2d 331, 334 (C. A. 9), and by permitting primary picketing, Congress must have intended to sanction the interference with the neutral's business which flows from this source. Congress guarded the neutral employer against an extension of the picket line to his premises; it did not shield him against the usual interruption occasioned by the approach of his employees to a primary picket line at another employer's establishment. A contrary holding would outlaw all primary picketing.

The Board's view that Section 8 (b) (4) (A) and (B) does not stigmatize as a "secondary boycott" picketing at the premises of an employer immediately involved in a labor dispute is supported by the general understanding of courts, legislatures and experts in labor relations that picketing and allied inducement at the premises of the primary employer does not become "secondary" merely because its consequences or object may be to dissuade third persons from doing business with the primary employer.

D. If the inducement is otherwise primary, it is immaterial that it is accompanied by violence, for the *means* of inducement have no relevance to Section 8 (b) (4) (A) and (B). In prohibiting secondary action, just as in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 513, the statute "draws no

distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence."

E. The proviso contained at the end of Section 8 (b) (4) does not invalidate the distinction between primary and secondary labor action. In the first place, invocation of the proviso does not eliminate the need for a distinction between primary and secondary action. If the only test of a lawful strike is whether it is called by a majority union, even a secondary strike, so long as it is called by a majority union, is proper. The only way to avoid this patently unsound result is to imply a distinction between primary and secondary action. Secondly, to make the legality of the strike depend upon its sponsorship by a majority union transforms Section 8 (b) (4) (A) and (B) from a sanction directed at secondary action into a sanction directed at minority action, and thereby achieves results at odds with the avowed purpose of Congress. Thirdly, respondent's view transforms the proviso from an exculpatory provision into an element of the offense, a result clearly not intended by the draftsmen.

ARGUMENT

PICKETING OF AN EMPLOYER AT THE SITUS OF A LABOR DISPUTE IN WHICH HE IS INVOLVED DOES NOT VIOLATE SECTION 8 (b) (4) (A) OR (B) OF THE ACT, ALTHOUGH EMPLOYEES OF NEUTRAL EMPLOYERS ARE INDUCED THEREBY NOT TO ENTER THE PRIMARY EMPLOYER'S PLACE OF BUSINESS

Section 8 (b) (4) (A) and (B) of the National Labor Relations Act provides that it shall be an unfair labor practice for a labor organization or its agents—

> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9.

Read literally, and in isolation from interrelated provisions of the statute, and without regard for the objectives which the legislative history shows

that Congress in these provisions intended to achieve, the quoted language appears to ban all strikes and picketing. For to forbid "a labor organization or its agents . . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . work . . . where an object thereof is . . . forcing or requiring . . . any employer or other person . . . to cease doing business with any other person," is to forbid all primary strikes, all primary picketing, and all related forms of inducement. Every primary strike has "*an* object thereof" to cause the employer to "cease doing business" with another person and thereby to induce the employer to yield to a demand in order to avoid resulting economic loss through the disruption of his business relations.[6] So too, and with the same end in view, all primary picketing and related inducement, by urging the workers of a neutral employer not to enter the premises of the struck employer, has as "an object thereof" to "induce or encourage the employ-

---

[6] In this respect, there is no distinction between a primary strike and a secondary strike, for each ordinarily has a two-fold objective. Each has the *tactical* objective of causing a cessation of business in furtherance of the *ultimate* objective of gaining accession to a demand. The difference is that, with respect to a primary strike, the struck employer is in a position to grant the demand, whereas with respect to a secondary strike, the struck employer is not in a position to grant the demand, but is instead being used as the medium by which to influence another employer's accession.

ees of any employer to engage in . . . a concerted refusal in the course of their employment to . . . work." As it has been pointedly stated, "Certainly it is *an* object of very many strikes and picket lines to induce a reduction in the struck employer's business by an appeal to customers—'any person'—to cease doing business with the employer;'" [7] indeed, the words have sufficient latitude to "reach out to and include" the effect of a strike in causing an interruption of "the business relation between an employee of the primary employer . . . and the primary employer. . . ." Rifkind, J., in *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672, 675 (S. D. N. Y.).

Nevertheless, considering only what it deemed the "plain wording of the statute" (R. 95), the Court of Appeals in the present case held the Union's conduct to be violative of Section 8 (b) (4) (A) and (B). "Comparing the union's activities with the plain wording of the statute" (R. 95) the court below held, in effect, that the Union acted unlawfully in that it induced the employees of Sales House to refuse in the course of their employment to transport or handle the goods of Kaplan, an object being both (a) to require Sales

[7] The anomaly of this literal reading as it pertains to customers is apparent. Inducement of customers to cease doing business is not forbidden because 8 (b) (4) (A) forbids only inducement of "*employees* of any employer" (*infra*, p. 29 n. 20); yet a strike which has that as an objective, as many strikes do, would be forbidden.

House to cease handling the products of Kaplan or doing business with it, and (b) to require Kaplan to recognize the Union, not certified by the Board as the exclusive representative, as the bargaining representative of its employees.

Such a construction of Section 8 (b) (4) (A) and (B) does violence to other provisions of the statute and frustrates the manifest purposes of Congress. For this reason, not only the Board, but also every court, with the single exception of the court below, which has had occasion to pass on the question, has rejected this construction.[7a] As this Court has expressly held, in the amended Act as in the original Act, "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *United Automobile Workers* v. *O'Brien*, 339 U.S. 454, 456, 457. Section 7, which protects the right to engage in concerted activities, and Section 13, which safeguards the right to strike, are explicit as to this; and other sections of the statute equally leave no doubt that Congress intended to protect and preserve the right to strike and picket, at least against an employer with whom a labor organization is involved in an economic or representation dispute.

[7a] *Denver Building & Construction Trades Council* v. *National Labor Relations Board*, —— F. 2d —— (C.A.D.C.); *United Brotherhood of Carpenters and Joiners* v. *Sperry*, 170 F. 2d 863, 868 (C.A. 10); *Printing Specialties & Paper Converters Union* v. *Le Baron*, 171 F. 2d. 331, 333-334 (C.A. 9). *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34 (C.A. 2).

Thus, Section 2 (3) preserves to strikers their status as employees.[8] Section 8 (d) lays down conditions which must be met by labor organizations before they may properly engage in strikes over contract modification and termination. Special handling is provided for strikes which may create a national emergency (Sections 206-210). Moreover, to aid in avoiding strikes a conciliation service was established to assist the parties in composing differences (Sections 201-205 of the Act). Section 8 (b) (4) (A) and (B) aside, a strike is unqualifiedly banned only if an object is to compel an employer to bargain with one union where another has been certified by the Board as exclusive representative (Section 8 (b) (4) (C)), or if an object is to compel an assignment of particular work in the absence of a Board determination of the class entitled to perform it (Section 8 (b) (4) (D)). Finally, Section 8 (b) (1) (A) prohibits labor organizations from using tactics of restraint or coercion of employees to induce them to support strikes.

Manifestly, these sections would be meaningless if Section 8 (b) (4) (A) and (B) made all strikes and associated inducement of employees unlawful. If the construction given Section 8 (b) (4) (A) and (B) by the court below is correct, all of the provisions discussed above become not only anom-

---

[8] *National Labor Relations Board* v. *Mackay Radio and Tel. Co.*, 304 U. S. 333, 347.

alous but absurd. A purpose to enact provisions having such inconsistent consequences is not to be attributed to Congress.

We think it apparent, therefore, that the proper interpretation of Section 8 (b) (4) (A) and (B) is not to be obtained by reading its words as though they existed in a vacuum. The statute must be read as a unified whole,[9] and in the light of the "mischief to be corrected and the end to be attained." [10] It becomes not only appropriate but indispensable, in construing the language of Section 8 (b) (4) (A) and (B), to look to its purpose and to the milieu in which it is to operate,[11] and to "interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed." [12]

So read, as we shall show, Section 8 (b) (4) (A) and (B) reflects the fact that "Congress, in the search for a compromise between the conflicting interests of employees in collective bargaining and

---

[9] "There is need to keep in view . . . the structure of the statute, and the relation, physical and logical, between its several parts." *Duparquet Co.* v. *Evans*, 297 U. S. 216, 218.

[10] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124.

[11] "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . ." Judge Learned Hand in *National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954, 957 (C. A. 2).

[12] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489.

that of neutrals in avoiding involvements in quarrels not their own, decided to draw the line at secondary boycotts . . ." L. Hand, C. J., in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 40 (C. A. 2), certiorari granted, No. 108, this Term. Implicit in the section, therefore, is the necessity of distinguishing, as the Board has done, between primary strikes and picketing which Section 8 (b) (4) (A) does not affect, and secondary strikes and picketing which Section 8 (b) (4) (A) and (B) outlaws.

The court below, however, disdained "attempts to draw a fine distinction between primary and secondary action" (R. 94); it regarded as irrelevant the fact, deemed crucial by the Board, that the picketing and related acts of violence stemmed from a labor dispute between the Union and Kaplan, and, so far as here relevant, was restricted to the immediate vicinity of the Kaplan mill. No picketing took place at the premises of Sales House, the neutral employer; Sales House was not drawn into the dispute except as a consequence of its employees' attempt to enter the premises of Kaplan.

The court adopted the view that to regard the Union's activity as outside the reach of 8 (b) (4) (A) and (B) "simply because it occurred in the vicinity of the struck employer's plant, would render the section ineffective and insufficient" (R. 96), "especially where there is violence" (R. 96).

This view obliterates the very line between primary strikes and picketing and secondary strikes and picketing which Congress drew. By obliterating this line the court below has transformed the character of Section 8 (b) (4) (A) and (B), from a compromise between conflicting interests, into a total subordination of one interest to the other.

We shall show that (1) to confine the area of industrial combat to the disputants involved in a labor controversy, Congress forbade a labor organization to utilize secondary pressures, but at the same time, it continued to permit and protect the use of primary pressures; (2) the literal language of Section 8 (b) (4) (A) and (B), though conceivably applicable to both primary and secondary pressures, must be construed together with other related provisions of the Act and in the light of the legislative background and purposes, so as to effectuate the distinction which Congress envisioned between the two types of pressures; [13] (3) in working out a harmonious interplay between primary and secondary labor action, which is essentially a task for "the empiric process of administration," [14] the Board properly determined that the exertion of pressure upon a primary em-

---

[13] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124.

[14] *Phelps-Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.

ployer through picketing and allied devices for enlisting the support of third parties, is primary and not secondary when the picketing is conducted in geographical proximity to the primary employer's place of business; and (4) action which is in all other respects primary does not become secondary because violence attends it, for the test is not whether the means of inducement are coercive (coercive means are outlawed by Section 8 (b) (1) (A)), but whether the pressure exerted is primary or secondary. We shall also show, contrary to the contention of the respondent which the court below evidently did not accept, that the Union's minority status is also immaterial in determining whether its conduct falls within the ban of secondary action.

A. THE STATUTORY SCHEME ENVISIONS A DISTINCTION BETWEEN PRIMARY AND SECONDARY LABOR ACTION

1. *The legislative history shows that Section 8 (b) (4) (A) and (B) was designed to eliminate union practices familiar to Congress as "secondary boycotts." The Section was not designed to curb primary strike pressure.*

In his major speech introducing the Senate version of the bill which became the Act, Senator Taft thus summarized the effect of Section 8 (b) (4) (A) of the Act: "It is made an unfair labor practice for any union to engage in a secondary

boycott."[15] Throughout the congressional deliberation upon 8 (b) (4) (A) its purpose was repeatedly described as the elimination of the "secondary boycott" from the arsenal of permissible union weapons.[16] In explanation of the aim of Congress, the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428):

> Under paragraph (A) strikes or boycotts, or attempts to induce or encourage such action, are made violations of the act if the purpose is to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with em-

---

[15] 93 Cong. Rec. 3838, in 2 Leg. Hist. 1012. "Leg. Hist." refers to the two volume edition entitled *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Off., 1948).

[16] S. Rep. No. 105, 80th Cong., 1st Sess., 7, 8, 22, 54, in 1 Leg. Hist. 413, 414, 428, 460; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, in 1 Leg. Hist. 547; 93 Cong. Rec. 4131, 4138, 4837-38, 4858, 4859, 4865, 5005, 5011, 5014, 6445-46, 7537, A. 2252, in 2 Leg. Hist. 1055, 1068, 1354-55, 1364, 1365, 1370-71, 1372-73, 1383, 1479, 1491, 1497, 1544, 1654, 1524.

> ployer B (with whom the union has a dispute).

The Senate Report exemplified the forbidden practice by a concrete illustration (*Ibid.*):

> [It is] an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3. (See testimony of R. S. Edwards, vol. 1, p. 176, *et seq.*[17]; *Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.*, 325 U.S. 797.)

This union attitude, which forbade the use of material at the point of installation because of the character of its manufacture elsewhere, was sum-

---

[17] ". . . The boycott we are objecting to operates like this: The A. F. of L. International Brotherhood of Electrical Workers controls the labor that installs electrical construction materials of all kinds. This IBEW refuses to install and brings pressure on contractors and wholesalers to prevent them from handling any of these electrical construction materials unless they have been manufactured by IBEW labor *in the original plants.*" (Emphasis supplied.) 1 *Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess. 176-177. As explained by the Second Circuit during its consideration of the case, the labor weapon involved was "refusal to work upon disfavored goods." *Allen Bradley Co.* v. *Local Union No. 3*, 145 F. 2d 215, 219 (C. A. 2), reversed, 325 U. S. 797. This type of "product boycott" is clearly secondary labor action. *Wadsworth Building Co.*, 81 NLRB 802, 805-806, enforced, 184 F. 2d 60 (C. A. 10), pending on petition for certiorari, No. 387, this Term.

marized by Senator Taft to be: "We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put into any building in New York City." [18] Each of the other illustrations of secondary activity cited by Senator Taft likewise pertained to creating a dispute at another plant or point of business because the product there utilized was deemed objectionable by virtue of conditions which prevailed at the original place of its manufacture.[19] Therefore, as conceived by the proponents of Section 8 (b) (4) (A), the gist of secondary activity is not the exertion of labor pressure at the original source of the dispute, but only the extension or proliferation of the dispute to an area beyond the primary center of controversy.

Thus, the purpose of 8 (b) (4) (A) is to confine the area of industrial conflict to the employer with whom the Union is engaged in a labor dispute and to prevent labor organizations from treating neutral employers, merely because they do business with the primary employer, as though they were parties to the dispute. To this end a labor organization is forbidden to direct its pressures against a neutral employer by depriving him of the services *of his own employees.*[20] Insulation of the

---

[18] 93 Cong. Rec. 4199, in 2 Leg. Hist. 1107.

[19] 93 Cong. Rec. 3838, 4199, in 2 Leg. Hist. 1012, 1107-1108.

[20] It is only pressure exerted on the neutral employer through his *employees* which is prohibited. A union is not forbidden to solicit the cooperation of the neutral employer by

neutral employer is effected by prohibiting a union from engaging in a strike or other concerted withholding of labor among employees of the neutral employer, or correlatively, from inducing or encouraging the employees of the neutral employer to take such action, where an object of the activity is to require the neutral employer to discontinue its normal business relations with the primary employer. The evil to which Congress was addressing itself in Section 8 (b) (4) (A) is depicted in the statements of Senator Taft (93 Cong. Rec. 4198, 4199, in 2 Leg. Hist. 1106, 1107, 1108):

> . . . This provision makes it unlawful to resort to a *secondary* boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. * * * under the provisions of the Norris-LaGuardia Act, it became impossible to stop a *secondary*

---

approaching him directly. *Schatte* v. *International Alliance*, 182 F. 2d 158, 165 (C. A. 9), certiorari denied, 340 U. S. 827; *Conway's Express*, 87 NLRB 972, 980-983; *Santa Ana Lumber Co.*, 87 NLRB 937, 941-942; *Arkansas Express, Inc.*, 92 NLRB, No. 64, 27 LRRM 1077; *Humphrey* v. *International Brotherhood of Teamsters*, 25 LRRM 2318, 2321 (N.D.N.Y., January 11, 1950). So too, a union may induce the customers of any employer to refrain from patronizing him. *Consolidated Frame Co.*, 91 NLRB, No. 197, 27 LRRM 1008; 1011; *Hoover Co.*, 90 NLRB, No. 201, 26 LRRM 1365, 1367-1368. Thus, as distinct from secondary pressure exerted through the medium of employees, unions are free under Section 8 (b) (4) (A) to appeal to employers, consumers, and other elements of the public at large to support its position.

boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to *secondary* boycotts. It has been set forth that there are good *secondary* boycotts and bad *secondary* boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of *secondary* boycotts. So we have so broadened the provision dealing with *secondary* boycotts as to make them an unfair labor practice. [Italics supplied.]

* * * * *

Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory on both sides. Someone else says to those employees, "We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions." Of course if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States. There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to

> strike because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that.
>
> * * * * *
>
> [We condemn the view] that if other workers do not like the way some employer is treating his employees, they can promote strikes in any other plant which happens to be handling the product of the plant whose management the workers do not like.

In short, Congress was of the view that "labor disputes should be confined to the business immediately involved and that unions should be prohibited from extending them to other employers by inducing and encouraging the latter's employees to exert economic pressure in support of their disputes." *Wadsworth Building Co., Inc.*, 81 NLRB 802, 812, enforced, 184 F. 2d 60 (C. A. 10), pending on petition for writ of certiorari, No. 387, this Term. It therefore "prohibited peaceful picketing, persuasion, and encouragement, as well as non-peaceful economic action, in aid of the forbidden objective." (*Id.*) See also *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584 (C. A. 2), enforcing 78 NLRB 504; *IBEW* v. *National Labor Relations Board*, 181 F. 2d 34 (C. A. 2), enforcing

82 NLRB 1028, certiorari granted, No. 108, this Term; *National Labor Relations Board* v. *Local 74*, 181 F. 2d 126 (C. A. 6), enforcing 80 NLRB 533, certiorari granted, No. 85, this Term; *Sterling Beverages, Inc.*, 90 NLRB, No. 75, 26 LRRM 1213.

Section 8 (b) (4) (B) of the Act is identical in scheme with Section 8 (b) (4) (A). It forbids a labor organization to force a primary employer, by pressure directed against the neutral employer through his employees, to recognize an *uncertified* union as the bargaining representative of the employees of the primary employer. In essence, 8 (b) (4) (B) is a qualification of 8 (b) (4) (A). On the one hand, it broadens the prohibitions of 8 (b) (4) (A) if the pressure against the neutral employer is aimed at forcing the recognition of an uncertified union; that is, in furtherance of this object, it not only forbids conscripting the neutral employer's aid by causing him to cease doing business with the primary employer, a result already achieved by 8 (b) (4) (A), but it also forbids conscripting the neutral employer to exert other influence on the primary employer, such as social or family pressure, or business pressure not covered by 8 (b) (4) (A).[21] On the other hand, if the

[21] Examples of business pressure perhaps not covered by 8 (b) (4) (A) may be, (1) to induce a neutral employer to refrain from reporting favorably on the credit standing of a primary employer; (2) to induce a neutral employer to exert his influence to keep a primary employer out of a trade asso-

pressure against the neutral employer is aimed at forcing the recognition of a *certified* union, 8 (b) (4) (B) lifts the prohibitions of 8 (b) (4) (A) and permits the conscription of the neutral employer's aid in requiring the primary employer to honor the exclusive status of the certified union.[22] Section 8 (b) (4) (B), therefore, merely refines the regulation of secondary labor action proscribed by Section 8 (b) (4) (A).[23]

2. *The legislative history shows that Congress did not intend to impair the right of labor organizations to exert primary strike pressure in labor disputes.*

The legislative history shows not only that Congress conceived of Section 8 (b) (4) (A) as prohibiting only secondary and not primary strike pressure, but also that it intended to continue to accord statutory protection to the exercise of primary pressure, of which the primary strike and

---

ciation; or (3) to induce a neutral employer to refrain from becoming an accommodation endorser on a promissory note on behalf of a primary employer.

[22] See *DiGiorgio Fruit Corp.*, 87 NLRB 720, 748-749. See also, S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428 ("... strikes and boycotts for recognition are not made illegal if the union has been certified as the exclusive representative."); H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, in 1 Leg. Hist. 547 ("... strikes and boycotts for recognition were not prohibited if the union had been certified as the exclusive representative.")

[23] Compare the relationship of the succeeding subsections with Section 8 (1) of the Wagner Act, as described in S. Rep. No. 573, 74th Cong., 1st Sess., p. 9.

primary picketing designed to induce third parties to support it are the main components. In the very statement in which he disapproved of the secondary boycott (*supra* pp. 30-31), Senator Taft stressed that if the employment "conditions" of the employees of the primary employer "are not satisfactory, then it is perfectly lawful to encourage them to strike." Senator Taft had earlier elaborated on this thought in placing before the Senate a bill of which he was the chief sponsor. The bill, he explained, was designed to remedy the situation of the past, as he conceived it, in which the law did not discriminate between "strikes for justifiable purposes and strikes for wholly illegal and improper purposes," such as "strikes in the nature of secondary boycotts" (93 Cong. Rec. 3834, in 2 Leg. Hist. 1005-06). He stressed, however, that "secondary boycotts" are to be distinguished from "strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes" (*Ibid.*). He added (93 Cong. Rec. 3835, in 2 Leg. Hist. 1007):

> Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and

> working conditions, when a contract has expired and neither side is bound by a contract.
>
> * * * * * *
>
> . . . So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.

It is thus plain that Congress considered the conventional primary strike to attain economic ends, as distinguished from the secondary boycott, to be permitted and protected labor action.

The primary organizational strike, no less than the primary strike for "the improvement of wages, hours, and working conditions," was also preserved intact. Adverting to Section 8 (b) (4) (B), the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428):

> It is to be observed that the *primary* strike for recognition (without a Board certification) is not proscribed. [Italics supplied.]

In practically identical terms, the House Conference Report stated (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, in 1 Leg. Hist. 547):

> It is to be observed that the *primary* strike for recognition (without a Board certification) was not prohibited. [Italics supplied.]

The House bill and an early version of the Senate bill had forbidden any strike for recognition, un-

less the union had been certified by the Board, but this broader prohibition was narrowed to permit a primary recognition strike, except where another union was certified as the representative (*infra*, pp. 71-75). Thus, the distinction between primary and secondary action is inherent in the statutory scheme of Section 8 (b) (4) (B), as well as of Section 8 (b) (4) (A); primary pressure in support of an organizational claim is permitted,[24] and secondary pressure may be brought to bear in support of a claim for recognition by a certified union (*supra*, pp. 33-34).[25]

As has been shown, except upon the assumption that Section 8 (b) (4) (A) and (B) does not prohibit any strike action other than that of a secondary nature, the Act's protection and restriction of strike activity in other respects is meaningless. Yet, as Senator Taft reiterated in summing up the bill which became the Act upon its return from

---

[24] *Howland Dry Goods Co.*, 83 NLRB 1037, 1041. As stated by Senator Taft: It is only "an *indirect* organizational strike" which is forbidden in the absence of a certified representative. 93 Cong. Rec. 3838, in 2 Leg. Hist. 1012. (Emphasis supplied.)

[25] "The thinking underlying 8 (b) (4) (B) seems to be that Congress considered it indefensible for a union with the democratic election machinery of the Act available to it to resort to secondary pressure to force recognition, but at the same time considered entirely justifiable the utilization of such an economic weapon against an employer who himself refused to abide by the results of the Board's processes, regardless of the injurious effect it might have on the business of a neutral." *Moore Dry Dock Co.*, 92 NLRB, No. 93.

conference (93 Cong. Rec. 6445-6446, in 2 Leg. Hist. 1544):

> The conferees rejected the broad prohibition of all kinds of strikes.[26] * * * The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes.

It cannot be assumed that Congress intended to subordinate its preservation of the right to exert primary strike pressure to its correlative objective of eliminating secondary pressure. For Congress was aware that existence of the right to strike was indispensable to the entire system of collective bargaining, and it was for this reason that, in the amended Act, as in the original Act, "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *United Automobile Workers* v. *O'Brien*, 339 U. S. 454, 456, 457.

3. ***Together with the right to engage in primary strikes, Congress preserved the right to induce third parties to support such strikes by withholding their patronage or services from the primary employer at his place of business.***

Inducement of others to support a strike is the related counterpart of a lawful cessation of work,

---

[26] This remark evidently had reference to the House bill which contained severe and broadly-stated curtailments of strikes, but which even in that form did not purport to ban all strikes. H. R. 3020, 80th Cong., 1st Sess., Secs. 12, 2 (13) to (16), in 1 Leg. Hist. 204-207, 168-170. See also, H. Rep. No. 245, 80th Cong., 1st Sess., 23-24, 43-44, in 1 Leg. Hist., 314-315, 334-335.

for "Little indeed would be left of the right to strike . . . if the striking employees were denied the concomitant right of peacefully picketing the immediate business of their employer." *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, 504-505.[27] But it is not necessary to rely merely upon inference from the nature of a strike to support the conclusion that Congress preserved the right to induce third parties to support primary strikes. The Congressional deliberations pertaining to Section 8 (b) (1) (A) of the Act affirmatively disclose that, no less than the primary strike itself, the inducement of others to support it, which is the goal of primary picketing and related conduct, was also left unimpaired.

Read in conjunction with Section 7 of the Act, Section 8 (b) (1) (A) makes it an unfair labor practice for a labor organization "to restrain or coerce employees in the exercise of the right" to *refrain* from union activity. "By Section 8 (b) (1) (A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of eco-

---

[27] "The importance of picketing in industrial struggles is reflected by the statement of a labor leader in a study of the recent strikes in the southern textile industry that the 'real contest of the strike takes place on the picket line'." Hellerstein, *Picketing Legislation and the Courts*, 10 Nor. Car. L. Rev. 158, 160 (1932).

nomic reprisal." *Perry Norvell Co.*, 80 NLRB 225, 239.[28] In its initial form, Section 8 (b) (1) (A) also contained the words "interfere with," but those words were expunged by unanimous consent in order to allay fear that the section, in derogation of "union organizational activities," would "be construed to mean that any conversation, any persuasion, any urging upon the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice."[29] Even as so restricted, it was charged that the section "would slow up the organizational activity of unions" and would "have the effect of outlawing organizational strikes and strikes for recognition."[30] In answer to that imputation, Senator Taft explained that (93 Cong. Rec. 4436, in 2 Leg. Hist. 1206, 1207):

> The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the

---

[28] See also, *National Maritime Union*, 78 NLRB 971, 982-987, enforced, 175 F. 2d 686 (C. A. 2), certiorari denied, 338 U. S. 954.

[29] 93 Cong. Rec. 4270, 4271, in 2 Leg. Hist. 1138-39. See also, 93 Cong. Rec. 4020-21, 4435, in 2 Leg. Hist. 1023-25, 1205. ". . . Congress does not forbid representatives, by reasonable means, to persuade employees to join the unions." H. Rep. No. 245, 80th Cong., 1st Sess., 30, in 1 Leg. Hist. 321.

[30] 93 Cong. Rec. 4430, 4431, in 2 Leg. Hist. 1195, 1197.

money which they are entitled to earn." The Board may say, "*You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them,* but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." . . . [Emphasis supplied.]

* * * * *

[Section 8 (b) (1) (A)] will slow up organizational drives only if they are accompanied by threats and coercion. . . . *It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees.*

. . . *It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion.* [Emphasis supplied.]

Summarizing the import of Section 8 (b) (1) (A) in a later analysis, Senator Taft explained that its prohibitions only "apply to *coercive acts* of unions against employees who did not wish to join or did not care to participate in a strike or a picket line."[31] And the House version of the bill, which contained explicit regulation of picketing activ-

---

[31] 93 Cong. Rec. 6859, in 2 Leg. Hist. 1623. (Emphasis supplied.) While the analysis was submitted to the Senate after it had passed the conference bill, it preceded the Senate's action overruling the President's veto and making the amendments law.

ity,[32] permitted "picketing in numbers or in ways . . . reasonably necessary to give notice of the existence of a labor dispute at the place being picketed."[33]

Thus, except insofar as the activity is subject to Section 8 (b) (1) (A), Congress desired to preserve from diminution "the traditional means of conveying to fellow workers and the public at large the fact that a labor dispute exists" with the primary employer, at least where the media employed are "the primary means which unions traditionally use to press their demands on employers." *Pure Oil Co.*, 84 NLRB 315, 318.

There is, therefore, no room for doubt that "Congress, in the search for a compromise between the conflicting interests of employees in collective bargaining and that of neutrals in avoiding involvements in quarrels not their own, decided to draw a line at secondary boycotts. . . ." Chief Judge Learned Hand, in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 40 (C. A. 2), certiorari granted, No. 108, this Term. That line contemplates that, while secondary pressures are prohibited, unions may continue to employ traditional primary pressures in support of economic and organizational ends.

---

[32] H. R. 3020, 80th Cong., 1st Sess., Sec. 12 (a) (1), in 1 Leg. Hist. 78, 204.

[33] H. Rep. No. 245, 80th Cong., 1st Sess., 44, in 1 Leg. Hist. 335.

B. Section 8 (b) (4) (A) and (B) must be read with the implicit condition that it prohibits secondary, but not primary, labor action

Congress' purpose in distinguishing between secondary boycotts and primary labor action, a distinction which, as we have shown, is clearly reflected in the statutory scheme, is the touchstone for the interpretation of Section 8 (b) (4) (A) and (B). That underlying theme is complemented by Section 13 of the Act which provides that:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

To be meaningful, this congressional guide to interpretation (*United Automobile Workers* v. *Wis. Board*, 336 U. S. 245, 259), requires that, in determining the "limitations or qualifications" imposed by prohibition of secondary labor action, "nothing . . . shall be construed . . . to interfere with or impede or diminish in any way the right to strike" against the primary employer involved in the dispute. See *Denver Building and Construction Trades Council* v. *National Labor Relations Board*, ——F. 2d —— (C. A. D. C.), certiorari granted, No. 393, this Term; Rifkind, J., in *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672, 675 (S. D. N. Y.). Section 8 (b) (4) (A) and

(B), therefore, must be read to bring about a harmonious interplay between the protection of primary labor action and the prohibition of secondary labor action, if the congressional objective is to be fulfilled.

If the court below is right in its construction, it would follow, as we have shown, *supra*, pp. 18-20, 22-25, that the primary strike, its normal concomitant, primary picketing, and related forms of inducement of others to support the primary strike, are banned. That such a construction "would destroy the Act by driving it to absurdity" (Rifkind, J., *ibid.*) demonstrates again that "There is no surer way to misread any document than to read it literally."[34]

"Since it is clear the 'cease doing business' clause [of Section 8 (b) (4) (A)], when read with the clause preserving the right to strike except as specifically provided, is not to be literally construed, its bounds must be sought. The history of the clause before, during and since enactment, in Congress, before the Board and in the courts, places primary labor action outside those bounds." *Denver Building and Construction Trades Coun-*

---

[34] L. Hand, J., in *Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (C. A. 2). See also, *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479; *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755; *Markham* v. *Cabell*, 326 U. S. 404, 409; *United States* v. *Dickerson*, 310 U. S. 554, 561-562; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 542, 544; *United States* v. *United Mine Workers*, 330 U. S. 258, 309.

cil v. *National Labor Relations Board*, —— F. 2d ——, (C. A. D. C.), certiorari granted, No. 393, this Term. Accordingly, the Board properly holds that the language of Section 8 (b) (4) (A) and (B) "must be read with the implicit condition" that the labor action it proscribes is recourse to "secondary, but not primary means." *Schultz Refrigerated Service, Inc.*, 87 NLRB, 502, 504.[35] The words are thereby given a meaning "according to the sense of the thing. . . ."[36]

C. PICKETING AND ALLIED INDUCEMENT CONDUCTED AT THE PREMISES OF THE PRIMARY EMPLOYER IS NOT WITHIN THE BAN OF SECTION 8 (b) (4) (A) AND (B).

Recognition that Section 8 (b) (4) (A) and (B) reaches only secondary labor action requires deter-

---

[35] See also, *Pure Oil Co.*, 84 NLRB 315; *Ryan Construction Corp.*, 85 NLRB 417; *Grauman Co.*, 87 NLRB 755; *Interborough News Co.*, 90 NLRB, No. 297, 26 LRRM 1440.

[36] *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618. In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, a remarkably similar reconciliation between realism and literalism was effected, for though all labor combination and its purpose have some restrictive influence on price competition, the Court did not sweep the activity uncritically into the ban of the Sherman Anti-Trust Act. The Court explained, 310 U. S., at 513: "If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations." See also the concurring opinion of Mr. Justice Stone in *United States* v. *Hutcheson*, 312 U. S. 219, 237-243.

mination whether the conduct in question in this case is of a primary or secondary character. The preservation of a genuine opportunity for recourse to primary labor action requires at its minimum the inviolability of a primary strike or primary picketing and allied inducement conducted *at the premises* of the primary employer.[37] The reach of Section 8 (b) (4) (A) and (B), in consonance with the congressional intent *not* "to curb primary picketing," has been explained by the Board to be that (*Ryan Construction Co.*, 85 NLRB 417, 418):[38]

> It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called "secondary" even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons.

In this case, the inducement directed by the Union pickets to the employees of Sales House to refrain from entering the Kaplan mill occurred

[37] For a discussion of the distinction between primary and secondary activity, in other circumstances, see the Board's brief in *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, No. 393, this Term, pp. 23-38.

[38] In the *Ryan* case, as illustrative of its statement in that case, the Board cited its earlier decision in the instant case (85 NLRB, at 418, n. 2).

at Kaplan's premises. Those premises were the situs of the primary organizational dispute between the Union and Kaplan. No picketing took place at Sales House. As the neutral employer, Sales House was not drawn into the dispute; its employees were affected only when they attempted to enter Kaplan's premises. And since, as we shall see (*infra*, pp. 63-66), violence attending the inducement is immaterial to the question whether strike activity is primary or secondary, the inducement at Kaplan's premises must be viewed in the same light as if it flowed from the mere existence of a picket line, the wording of a placard on the picket's back, slogans chanted by the pickets, leaflets distributed by the pickets, explicit oral requests of the pickets, or a combination of these.[39] Therefore, the nub of the issue presented by the Board's holding that such inducement is primary in character is whether, by picketing and allied inducement conducted at the premises of the primary employer, a union may influence employees of a neutral employer who approach the pri-

[39] It is of no moment that none of Kaplan's employees were on strike (*supra*, p. 6), for "Picketing without a strike is no more unlawful than a strike without picketing." *Exchange Bakery* v. *Rifkin*, 245 N. Y. 260, 263, 157 N. E. 130, 132. "Picketing for organizational purposes or to call attention to unfair conditions—where all other attributes of primary action are present—has never been considered to attain a secondary character, simply because no strike, strikebreakers, or replacements are to be found on the picketed premises." *Moore Dry Dock Co.*, 92 NLRB, No. 93. See also, *infra*, pp. 68-78.

mary employer's place of business, not to enter his premises.[40] Stated otherwise, is a labor organization forbidden to engage in conventional union efforts to secure observance of a primary picket line by all workers?

The only basis for doubting that such inducement is primary in character is that, if it succeeds in influencing employees of the neutral employer not to enter the premises of the primary employer, it will cause an interruption in the neutral employer's business. But, if any scope is to be left for the permissive exertion of primary pressure, the prohibition of secondary pressure cannot go so far as to insulate the neutral employer completely from all the repercussions of a labor dispute. The interdependence of economic interest of those who do business with each other[41] is such that primary pressure directed against one enterprise, if successful, unavoidably has a disruptive effect on the other. Since the "reluctance of workers to cross a picket line is notorious" (*Printing Specialties and Paper Converters Union* v. *Le-*

---

[40] This case does not present the related question whether, as the Board holds, so long as the inducement invites action *only* at the premises of the primary employer, it is immaterial where the inducement takes place. *Pure Oil Co.*, 84 NLRB 315, 319; *Interborough News Co.*, 90 NLRB, No. 297, 26 LRRM 1440; *DiGiorgio Fruit Corp.*, 87 NLRB 720.

[41] "The interdependence of economic interest of all engaged in the same industry has become a commonplace." *AFL* v. *Swing*, 312 U. S. 321, 326.

Baron, 171 F. 2d 331, 334 (C. A. 9)),[42] Congress, by permitting primary picketing, must have recognized that its insulation of neutral employers could not be absolute. Indeed, complete insulation of the neutral employer is incompatible with a workable concept of neutrality, for the neutral employer can never attain an absolute condition of neutrality which would entitle him to absolute protection; if the neutral ceases to do business with the primary employer he aids the union, and if he continues to do business with the primary employer he aids the latter, so that any action the neutral takes aligns him in some measure with one or the other of the primary disputants.

At the least, in the conventional case, the compromise which Congress effected allows for union efforts to curtail the primary employer's business by picketing at the premises of the primary employer to induce the employees of any neutral who approaches the premises not to enter therein. By primary picketing and allied appeals, the union may induce employees of neutral employers to refrain from assisting the primary employer by rendering services to him at his place of business. When confined to stoppage of business at the primary employer's premises, the thrust of the pres-

[42] "It is almost a rule of trade-union ethics for one labor union to respect a picket line established by another." *L. A. Young Spring & Wire Corp.*, 70 NLRB 868, 874, enforcement denied on other grounds, 163 F. 2d 905 (C. A. D. C.). See also, *Packard Motor Car Co.*, 61 NLRB 4, 16, *affirmed*, 330 U. S. 485.

sure is clearly against the primary employer, and is an integral part of the primary strike. The effect upon the neutral employer's business of the withholding of labor by his employees at the primary employer's premises in these circumstances is entirely incidental to the primary picketing, and is therefore not to be regarded as an attempt to exert secondary pressure upon the neutral employer. But the union may not induce work stoppages at a neutral employer's premises. It may not call a strike at the premises of one who supplies or delivers goods to, or purchases goods from the primary employer; for the thrust of such strike action is against the neutral employer and is not a mere incident of primary strike pressure. By this distinction the business of the neutral employer is protected from an incursive foray outside the area of the primary dispute, while, at the same time, the exertion of pressure at the primary employer's premises is unimpaired.

Analysis of the fundamental elements of labor action emphasizes the propriety of permitting a union engaged in a labor dispute to cause a cessation of business through influencing employees of a neutral employer not to enter the primary employer's premises by picketing and allied inducement at those premises. Economic pressure on the primary employer, to cause accession to a union's demands, "may be exerted at three points: first, at the employer's labor market; second, at his

supply market, and third, at his sales market."[43] Each of these markets may be reached at the primary employer's premises; and it is to affect all of them that pickets are "stationed at the place of business involved in the dispute" in order that they may "by word of mouth, or signs or placards, seek to dissuade workers and others from entering the plant for purposes of business or from otherwise doing business with the employer. Their mere presence at the plant may be sufficient notice to persons interested that the plant is involved in a labor dispute."[44]

Thus, to suppose that inducement of employees of a neutral employer at the primary employer's premises was forbidden is to assume that primary labor action was limited to effecting a curtailment of the primary employer's labor market, but not his supply and sales market.[45] But primary labor action has never been restricted to an attempt to deprive the primary employer of the services of his own workers or prospective employees; it embraces as well attempts to cut off the inflow and outgo of materials *at the primary employer's premises.* The only basis for doubting that primary action encompasses all of this is that a consequence of stopping the inflow and outgo of materials is

---

[43] Restatement, Torts, Ch. 38, Topic 3, pp. 138-139 (1939).

[44] *Id.*, Sec. 779, Comment f.

[45] Actually, respondent's argument is premised on an assumption that the labor market, no less than the supply and sales market, may not be curtailed (*supra*, p. 20).

to interrupt, *pro tanto,* the business of the neutral employer. But the sales and purchases of a neutral employer are affected as much by the inability of the primary employer to produce because of lack of workers as by the inability of the primary employer to secure supplies or make shipments at his premises. Injury to the neutral employer results, not from secondary pressure, but from doing business in an interdependent economic world. In safeguarding the interests of the neutral employer and at the same time protecting recourse to primary labor action, Congress could not have intended—in the absence of any explicit indication to that effect—such a drastic inroad into the effectiveness of primary activity as inheres in limiting union pressure to an appeal solely to the workers employed at the primary employer's plant.

Furthermore, to hold that inducement directed at the primary employer's labor market is permitted, but that inducement directed at the primary employer's supply and sales market is prohibited, requires the drawing of an unrealistic distinction between intended and incidental inducement of the employees of a neutral employer. Picket line activity may be conducted in order to induce the primary employer's workers and prospective employees not to work. Such inducement, which must be permitted if any semblance of primary pressure is to be retained, will have a natural tendency to dissuade employees of neutrals from entering the primary employer's premises. *Supra,*

p. 48). Because this result, incidental to permitted inducement, must be countenanced, the only remaining line which can be drawn is to say that incidental inducement of the employees of a neutral is allowed but that intentional inducement is banned.

Such a line creates more mischief than it avoids. According to this formulation, the inducement which flows from the mere existence of a picket line is permitted, but as soon as a picket tells the employee of a neutral that to cross the picket line is to "scab," that is prohibited. Suppose, instead of such an oral statement, the same statement is printed on a picket's placard for all the world to see. Is the ensuing inducement of employees of other employers who approach the picket line incidental or intended? Must the printed statement be qualified by the addition of the words "except employees of other employers"? Must the placard be removed when employees of other employers approach the line? What is the picket's obligation when workers employed at the plant and employees of other employers approach simultaneously? Such queries can be multiplied by the infinite variety of situations which picket line activity presents. The nice differentiations implicit in the distinction between incidental and intended inducement, foreign to the rigor of picket line activity,[46] demonstrate the artificiality of segment-

[46] Compare Frankfurter and Greene, *The Labor Injunction* (1930), p. 35: Picket controversies "make a heavy demand

ing picket line activity in this fashion. The need for such unrealistic dissection stems only from the equally unrealistic assumption that primary pressure can be divided into permissive curtailment of the labor market, on the one hand, and forbidden abridgment of the sales and supply market, on the other. Both misconceptions fall with the recognition that primary labor action contemplates undiluted picket line activity to reach all markets so long as the picketing is confined to the situs of the primary dispute.

This result has been reached by two courts of appeals, in addition to the Court of Appeals for the District of Columbia Circuit, see *Denver* case, No. 393, this Term, which, in sustaining the constitutionality of Section 8 (b) (4) (A), read it as not reaching inducement restricted to the situs of the primary employer's premises.[47] The Court of Ap-

upon intellectual detachment and require a sturdy hold upon reality. They call for understanding and imagination rather out of the current of judicial experience. It is the rare judge who sees that 'men become earnest and excited and vigorous at such times . . . . . The fervor of argument is upon them. . . . They forget etiquette and grammar. . . . . Instigated by emotion and impelled by deep conviction men always employ strong words. . . . The nomenclature of the strike is not the language of the parlor' ".

[47] A third Court of Appeals, that for the Second Circuit, in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 37-38, certiorari granted, No. 393, this Term, expressly reserved this situation in interpreting the reach of Section 8 (b) (4) (A). Compare the reliance on this reservation in *Anderson Sons Co.* v. *Teamsters Union*, 26 LRRM 2208, 2214 (Ohio Ct. of App., May 1, 1950).

peals for the Tenth Circuit stated that (*United Brotherhood of Carpenters and Joiners* v. *Sperry*, 170 F. 2d 863, 868):

> . . . The promulgation and circulation of a blacklist and the peaceful picketing of premises in the course of a labor dispute may constitute a phase of the constitutional right of free utterance, *if the blacklist is confined to the name of the employer primarily involved in the controversy and the picketing is confined to the premises of such employer.* [Emphasis supplied.]

The Court of Appeals for the Ninth Circuit stated that (*Printing Specialties and Paper Converters Union* v. *LeBaron*, 171 F. 2d 331, 333-334):

> The debate here is whether peaceful picketing may constitutionally be confined by legislation to the area of the industrial dispute, or, in plainer English, *to the premises of the employer with whom the dispute is in progress.* [Emphasis supplied.]

Furthermore, in view of Senator Taft's reference to stopping "a secondary boycott . . . unlawful . . . at common law" (*supra*, pp. 30-31), it is appropriate to look "to the history of the secondary boycott" in order that Section 8 (b) (4) (A) and (B) may be "read with the aid of the glossary provided by the law of secondary boycott." Rifkind, J., *supra*, 75 F. Supp., at 676. Although the term "secondary boycott" is a "loose and uncertain label,"[48] of "vague signification" without

[48] Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 Yale L. Jour. 341 (1938).

"precise and exclusive denotation," [49] its meaning has sufficiently coalesced to permit the general statement that primary picketing and allied inducement does not fall under the prohibition of secondary action though its consequence or object may be to dissuade third persons from doing business with the primary employer. As two writers put it (Barnard and Graham, *Labor and the Secondary Boycott*, 15 Wash. L. Rev. 137, 141, 144 (1940)):

> . . . it is to be observed that in so far as purely peaceful picketing of R's [primary employer's] place of business by E [employees of primary employer] seeks to persuade customers (C), i.e., third parties (T), not to patronize R and other employees (E) not to work for R, such picketing contains at least the analytical elements of the "secondary boycott" since T has effectively been brought into the picture. *It is, however, recognized that peaceful picketing of R by E has never been designated by the courts as a "secondary boycott"* . . . [Italics supplied.]

---

[49] *United Union Brewing Co.* v. *Beck*, 200 Wash. 474, 490, 93 P. 2d 772, 779. See also Frankfurter and Greene, *The Labor Injunction*, 42 (1930). The use of the term is avoided altogether in the Restatement of Torts because it "has such an uncertain meaning and is so frequently applied to such diverse situations . . ." (Vol. 4, p. 152). However, in the interpretation of Section 8 (b) (4) (A) and (B), the use of the distinction between primary and secondary activity is a necessary analytical and descriptive tool, for its meaning is bottomed on the distinction.

* * * * *

> . . . unquestioned recognition has now been accorded the legality of the peaceful picketing of R by E, albeit an objective is admittedly to influence T . . . [Such cases are those] involving union activity in geographical proximity to the employer's place of business. . . .

As another writer has stated (1 Teller, *Labor Disputes and Collective Bargaining*, 456 (1940)):[50]

> It has never been suggested that pickets engaged in peaceful primary picketing may be said to be engaging in secondary picketing where, without picketing third parties, they seek whether through the distribution of literature or otherwise to enlist the support of such third parties.

The view of the courts is that the capacity of primary picketing and allied inducement to draw third persons into a labor dispute at the premises of the primary employer does not make it secondary in nature. *Ex parte Henry*, 147 Tex. 315, 326,

---

[50] See also, Smith, *Coercion of Third Parties in Labor Disputes—The Secondary Boycott*, 1 La. L. Rev. 277, 286 (1939) (". . . if picketing at the manufactory alone [takes place] . . . no one would suppose . . . that the manufacturer would be entitled to relief merely because the picketing at the factory was successful in stopping retail sales elsewhere."). Cf., Frankfurter and Greene, *The Labor Injunction*, 43 (1930) ("The so-called primary boycott, a mere withholding of patronage and refusal to trade, is unimportant, and its legality has rarely been questioned.")

215 S. W. 2d 588, 595;[51] *Schivera* v. *Long Island Lighting Co.*, 296 N. Y. 26, 69 N. E. 2d 233;[52] *Gruet Motor Car Co.* v. *Briner*, 229 S. W. 2d 259 (Mo. App.); *Consolidated Realty Co.* v. *Dyers, Finishers and Bleachers Federation*, 137 N. J. Eq. 413, 415-416, 45 A. 2d 132, 133-134; *Wright* v. *Teamsters Union Local*, 33 Wash. 2d 905, 913, 207 P. 2d 662, 666; *Northwestern Pacific Railroad Co.* v. *Lumber & Sawmill Workers' Union*, 31 Cal. 2d 441, 447-448, 189 P. 2d 277, 281;[53] *Boyd* v. *Dodge*, 234 S. W. 2d 204, 207 (Ark.). As stated in the *Henry case* (147 Tex., at 326, 215 S. W. 2d, at 595):

> . . . it seems to be the position . . . that since the employees of the railways would not cross the picket line manned by [members of the striking union], the picketing *and the consequent refusal of the railway employees to serve the* [primary] *employer's plant* constitute such concerted action between [members of the striking union] and those employees as to amount to secondary picketing and boycotting . . . . picketing does not offend . . . merely because third parties who come to the area of the

---

[51] See also *International Brotherhood of Teamsters* v. *Best Motor Lines*, 229 S. W. 2d 912, 918-919 (Tex. Civ. App.); *Alamo Motor Lines, Inc.* v. *International Brotherhood of Teamsters*, 229 S. W. 2d 112 (Tex. Civ. App.).

[52] See also, *Clopay Corp.* v. *Mazer*, 73 N. Y. S. 2d 126 (Sup. Ct. Sp. Term).

[53] See also, *Holt* v. *Superior Court*, 27 LRRM 2129 (Cal. Dist. Ct. of Ap., November 14, 1950).

> dispute may prove sympathetic to one disputant rather than to the other. [Italics added.]

And as stated in the *Boyd case* (234 S. W. 2d, at 207):

> A secondary boycott occurs when striking employees, in addition to picketing the premises of their own employer, also establish picket lines around the premises of others not so directly interested in the labor dispute, such as customers to whom the primary employer sells or manufacturers from whom he buys.

Similarly, in construing the "secondary boycott" prohibition of the Wisconsin Employment Peace Act,[54] the Wisconsin Employment Relations Board has held that, in picketing in front of an apartment building to support an economic demand on behalf of an employee of that building, a union did not engage in secondary activity though the consequence of the picketing was to curtail delivery of material by employees who refused to pass the

[54] Wis. Stat. c. 111 (1949). Section 111.06 (2) (g) of the Wisconsin Employment Peace Act provides that it "shall be an unfair labor practice for an employee individually or in concert with others" to "engage in a secondary boycott," and Section 111.02 (12) defines a "secondary boycott" to "include combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists, whether by (a) withholding patronage, labor, or other beneficial business intercourse, (b) picketing, (c) refusing to handle, install, use or work on particular materials, equipment or supplies, or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another."

picket line to the detriment of tenants who were thereby deprived of services (*Lanson Investment Co.*, 26 LRRM 1147, 1148):

> Ordinarily, striking employees and the union representing them have a right to acquaint the public with the fact of the existence of a strike, the causes thereof, and to appeal for aid from the public by withholding patronage to the struck employer. Ordinarily, these activities are carried on by a union by the establishment of a picket line at the premises of the employer, the pickets carrying signs indicating the nature of the dispute and frequently carrying appeals for aid. One of the results of such picketing automatically anticipated by the union is that members of sister unions will respect a picket line so established and will refuse to enter property so picketed.
>
> * * * * *
>
> . . . In this case as in the case of all office buildings or apartment buildings, the only place that can properly be picketed when a dispute arises between the employees of the apartment or office building and the employer, is such building. Such picketing is engaged in concededly for the purpose of bringing economic pressure on the employer to grant the requests of the union. In all such cases, third persons are bound to suffer inconvenience and frequently loss. The picketing however cannot be said to be directed against the third person and in this

case, it is privileged as to the owner of the apartment building.

And federal district courts, in denying preliminary injunctive relief ancillary to the Board's final adjudication of the secondary labor action alleged (Section 10 (l) of the Act), have relied on the distinction between primary and secondary picketing.[55]

Accordingly, the Board properly holds, in applying the primary-secondary dichotomy which Section 8 (b) (4) (A) and (B) prescribes, that picketing and allied inducement conducted at the premises of the primary employer is primary in character. This formulation is confirmed by (1) its promotion of the congressional purpose to protect neutral employers by confining the area of industrial conflict to the situs of the primary dispute, (2) its furtherance of the congressional objective of preserving the potency of primary labor action, and (3) its compatibility with the conventional understanding of a secondary boycott. Ensuing harm to third persons there may nevertheless be, but such "Resulting injury is incidental and must be endured."[56]. Such injury is incidental, not because it is unintended, but because it is ancillary to primary labor action.

---

[55] *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y.); *Elliott* v. *Amalgamated Meat Cutters and Butcher Workmen*, 91 F. Supp. 690, 697-699 (W. D. Mo.), appeal pending.

[56] *Exchange Bakery & Restaurant* v. *Rifkin*, 245 N. Y. 260, 263, 157 N. E. 130, 133.

In the judicial consideration of such a formulation, which entails fitting particular circumstances into the pattern of a primary-secondary principle, since "the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination . . . is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 131. In positing a distinction between primary and secondary activity, Section 8 (b) (4) (A) and (B) makes clear that the "line must be drawn somewhere" (*Sterling Beverages, Inc.*, 90 NLRB, No. 75, 26 LRRM 1213, 1215), and "when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Board] must be accepted unless we can say that it is very wide of any reasonable mark." *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 611, quoting Mr. Justice Holmes in *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41. Moreover, the use of this standard of review in this type of case is particularly apt, for the traditional difficulty in formulating a clear distinction between primary and secondary activity suggests the unique need for administrative handling by an agency which can bring to the task the advantages of "uniformity,"

"technical expertness," "continuous attention and a clearly allocated responsibility." Final Report, Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., 14, 16.

D. VIOLENCE ATTENDING THE INDUCEMENT IS IMMATERIAL TO THE QUESTION WHETHER PICKET LINE ACTIVITY IS PRIMARY OR SECONDARY

In this case, the inducement by the Union pickets at the premises of Kaplan was accompanied by violence, in the form of rocks thrown at the employees of Sales House, in order to dissuade the employees from entering Kaplan's premises (*supra*, p. 7). The Board held that "Violence on the picket line is not to be condoned, but violence does not convert *primary* picketing into *secondary* action within the meaning of Section 8 (b) (4) (A) or (B)" (R. 55). The court below, however, parenthetically justified its refusal to sustain the Board's distinction between primary and secondary activity, by regarding it as insufficient "especially where there is violence" (R. 96).

The Board properly holds that if the inducement is otherwise primary, it is immaterial that it entails an exertion of violence, for the *means* of inducement have no relevance to Section 8 (b) (4) (A) and (B) where the question in issue is whether an *object* of the inducement is to instigate primary or secondary pressure. "It was the *objective* of the union's secondary activities, . . . and

not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision." *Wadsworth Building Co., Inc.*, 81 NLRB 802, 812, enforced, 184 F. 2d 60 (C. A. 10). As this Court has held, "By § 8 (b) (4), strikes to attain named objectives are made unfair labor practices," but by that provision "it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board." *United Automobile Workers* v. *Wisconsin Board*, 336 U. S. 245, 262-263.

Means are important in determining whether, in violation of Section 8 (b) (1) (A) of the Act, a union is restraining and coercing employees in the exercise of the right to refrain from self-organization. (*Supra*, pp. 39-42).) With respect to Section 8 (b) (1) (A), unlike Section 8 (b) (4) (A) and (B), "Congress was aiming at means, not at ends." *Perry Norvell Co.*, 80 NLRB 225, 239. In this case, therefore, had the complaint alleged restraint and coercion of employees in violation of Section 8 (b) (1) (A), the violence could have been litigated to determine whether it fell within the ban of that section, but, as the Board stated (R. 55), since no such allegation was made, it was "not called upon to decide" that dissociated question.[57] The

[57] Indeed, to have decided the issue might well have entailed prejudicial procedural irregularity. See *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, 175 F. 2d 675, 677 (C. A. 5).

selective manner in which Congress fashioned different legal tools to reach the separate questions entailed in each reinforces the conclusion that the coercive character of the means employed, which is the province of Section 8 (b) (1) (A), is not to be confused with the object sought, which is the province of Section 8 (b) (4) (A) and (B).

Furthermore, to make violence a criterion of secondary activity creates a serious risk of requiring indiscriminate invocation of preliminary injunctive relief ancillary to final Board action. With respect to all unfair labor practices other than those enumerated in Section 8 (b) (4) (A), (B), and (C), Section 10 (j) empowers the Board, *in its discretion,* to seek injunctive relief preliminary to its final administrative adjudication of the practices of which complaint is made. However, as to the practices listed in Section 8 (b) (4) (A) (B) and (C), Section 10 (l) makes it mandatory to seek interlocutory injunctive relief pending the Board's final action.[58] This means that in every case of violence on a primary picket line, if such violence were to make the activity a violation of 8 (b) (4) (A), it would be mandatory to seek injunctive relief. On the other hand, if the violence as such is pertinent only to a violation of 8 (b) (1) (A), it remains discretionary whether the

[58] Section 10 (l) also governs injunctive relief with respect to Section 8 (b) (4) (D) violations, but as to these recourse to injunctive relief is discretionary. See *Herzog* v. *Parsons*, 181 F. 2d 781 (C.A.D.C.) certiorari denied, 340 U. S. 810.

seriousness of the situation makes a request for injunctive relief appropriate. It is most unlikely that Congress intended in every case of primary picket line violence, without exception, to require that preliminary injunctive relief be sought and to exclude from this decision any play for administrative discretion. The scheme of injunctive relief thus reflects the inappositeness of making the question whether picketing is primary or secondary turn on the presence or absence of violence.

Accordingly, since Section 8 (b) (4) (A) and (B) is concerned with the object to which the inducement is directed, not the repressive nature of the means by which the inducement is effected, violence is immaterial to the existence of secondary action. Therefore, here, in prohibiting secondary action, just as in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 513, the statute "draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence."

E. THE VALIDITY OF A UNION'S ACTIONS IN RELATION TO SECTION 8 (b) (4) (A) AND (B) DOES NOT TURN ON WHETHER THE UNION MEETS THE CONDITIONS PRESCRIBED BY THE PROVISO CONTAINED AT THE END OF SECTION 8 (b) (4)

In the court below, respondent relied in part upon the proviso contained at the end of Section

8 (b) (4) to invalidate the distinction between primary and secondary labor action. The proviso states:

> That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act

Respondent contended that, in ascertaining whether activity falls within the ban of Section 8 (b) (4) (A) and (B), the question is not whether it is primary or secondary in character, but whether it meets the conditions of the proviso, namely, that the strike be called by a union entitled to recognition. In this case, the argument runs, since the picketing was sponsored by a minority union, the activity is prohibited by Section 8 (b) (4) (A) and (B), and is not exempted by the proviso.[59] In essence, according to this contention, which the court below evidently did not accept, the distinction drawn by Section 8 (b) (4) (A) and (B) is between a majority and a minority strike and not between a primary and secondary strike.

We shall show that this reading of the proviso, (1) transforms the legislative aim of Section 8

---

[59] Respondent's brief in the court below, p. 21.

(b) (4) (A) and (B) from a sanction directed at secondary action into a sanction directed at minority action, (2) does not eliminate the need for a distinction between primary and secondary conduct, and (3) attributes to the proviso, rather than to the substantive sections themselves, the function of defining the scope of the offense.

1. Respondent's interpretation of the proviso would forbid every strike called by a minority union, including the primary organizational strike. Under its view it is irrelevant whether the strike is primary or secondary.

Ordinarily, however, "in the absence of applicable legislation to the contrary, the propriety of an object of concerted action by workers does not depend upon whether the object has the support of a majority of the workers affected. Concerted movements which ultimately gain the support of majorities are frequently begun by minorities."[60] It is a commonplace that a primary organizational strike, and certainly primary organizational picketing and allied inducement, frequently begins as minority action in an effort to obtain the adherence of a majority.[61] Indeed, in sustain-

---

[60] Restatement, Torts, Ch. 38, Topic 2, p. 120 (1939).

[61] *E.g., Park & Tilford Import Corporation* v. *International Brotherhood, Local No. 848*, 27 Cal. 2d 599, 165 P. 2d 891; *AFL* v. *Swing*, 312 U. S. 321; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. [illegible]3; Restatement, Torts, § 785, Comment (b).

ing the legislative policy of a state which prohibited picketing of an employer to compel him to coerce his employees' choice of a bargaining representative, this Court recently expressed a reservation concerning the constitutional propriety of reaching "picketing directed at employees for organization purposes," pointing out that the state action in issue did not "prohibit picketing of workers by other workers." *Building Service Union* v. *Gazzam*, 339 U. S. 532, 539-540.

Nevertheless, it is clear that, although minority action is a familiar feature in the labor scene, the consequence of respondent's interpretation of the proviso is to outlaw all strikes and associated inducement conducted by a minority union regardless of the circumstances attending it. Respondent deduces this sweeping policy determination by indirection, through an equivocal proviso. But it is inconceivable that Congress intended the proviso to have this effect, for no suggestion that minority strikes were being outlawed by this Section was voiced by anyone during the course of lengthy and heated legislative deliberation concerning virtually every controversial matter in the labor relations field. The short answer, of course, is that Section 8 (b) (4) (A) and (B) was aimed, not at eliminating any possible abuse which may inhere in primary minority action, but at curbing the evil which Congress found to exist in secondary action. Discussion was directed, therefore, at the issue of

secondary, not minority, labor action. To displace the articulated purpose of Congress with an unrevealed purpose brings "into question the candor of Congress as well as the integrity of the interpretative process." [62]

The circumspect manner with which Congress treated union minority action when it was in fact considering that question is its own refutation of the extravagant purpose which respondent would impute to the proviso to Section 8 (b) (4) (A) and (B). Congress rejected a proposal making the validity of a strike dependent upon affirmative authorization given by a majority of employees in an election. As this Court recently held (*United Automobile Workers* v. *O'Brien*, 339 U. S. 454, 458):

> . . . The federal Act . . . does not require majority authorization for any strike. This requirement of approval by a majority of the employees was contained in the bill which passed the House of Representatives;* but the Act as finally adopted deliberately refrains from imposing the prerequisite of majority approval in each of its references to strike votes. §§ 203 (c), 209 (b)-210.

* H. R. 3020, 80th Cong., 1st Sess., § 2 (11) (B) (vi) (h) (1947). The legislative history demonstrates that this proposal was rejected on the merits, and not because of any desire to leave the states free to adopt it. See, *e.g.*, H. R. Rep. No. 510, 80th Cong., 1st Sess.,

[62] *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 508.

34-35 (1947); testimony of Governor Stassen, *Hearings before Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., 562-65, 572-78, 586-89 (1947).

More particularly, for present purposes, the only explicit limitation placed upon the organizational strike activity of a union by virtue of its minority status is contained in Section 8 (b) (4) (C) of the Act. It provides that it shall be an unfair labor practice for a labor organization to engage in or induce a strike where an object is "forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9".[63] The House bill, as reported and passed,[64] and an early version of the Senate bill[65] contained a broader prohibition banning any recognition strike

---

[63] See, H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44, in 1 Leg. Hist. 548; S. Rep. No. 105, 80th Cong., 1st Sess., 22 in 1 Leg. Hist. 428; 93 Cong. Rec. 1844, 1846, 4905, in 2 Leg. Hist. 981-982, 986, 1455; 93 Cong. Rec. 136; 5 *Hearings before Committee on Education and Labor, House of Representatives, on Bills to Amend and Repeal the National Labor Relations Act*, 80th Cong., 1st Sess., 3161-62; 4 *Hearings before the Committee on Labor and Public Welfare, United States Senate, on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., 1905.

[64] H. R. 3020, 80th Cong., 1st Sess., Sec. 12 (a) (3) (c) (i), in 1 Leg. Hist. 79, 205; see also, H. Rep. No. 245, 80th Cong., 1st Sess., 44; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 59; both in 1 Leg. Hist. 335, 563.

[65] S. 360, 80th Cong., 1st Sess., Sec. 13 (b) (1) (January 27, 1947).

except where the labor organization was certified by the Board as the exclusive bargaining representative. In its ultimate evolution, this total ban of any recognition strike, except in support of the status of a certified union, was narrowed to its present form, which prohibits a recognition strike only if another union has been certified; thus, instead of preconditioning the validity of a primary recognition strike upon the existence of a certification of the striking union, Congress did the reverse, and preconditioned the validity of such a strike solely upon the absence of certification of another union. As a matter of deliberate choice, therefore, except for the narrowly-defined activity regulated by Section 8 (b) (4) (C), Congress left unrestricted the right of a labor organization, whether majority or minority, to engage in a recognition strike. The Joint Committee on Labor-Management Relations, in the discharge of its function to study and investigate "the administration and operation of existing Federal laws relating to labor relations" (Title IV, Sec. 402 (7) of the Act) has reported concerning strikes for recognition (Com. Print., Rep. No. 986, Part 3, 80th Cong., 2nd Sess., 70-71):

> Both the bill passed by the House of Representatives in 1947 [66] and early committee

---

[66] H. R. 3020, 80th Cong., 1st Sess., Sec. 12 (a) (3) (C) (ii), in 1 Leg. Hist. 205-206.

versions of the Senate bill [67] contained some form of prohibition against a strike for a purpose for which the act provided an administrative remedy. Such a provision would have prohibited a strike for recognition, since the labor organization has available the certification processes of the Board. *The Taft-Hartley law's only limitation upon such strikes is that provided by Section 8 (b) (4) (C). The right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative.* (Emphasis supplied.)

A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have rejected it. A number of instances have just been called to the committee's attention (hearings, p. 267).

Many labor organizations have enjoyed recognition by, and contracts with, employers without ever having been certified by the Board. The employers have not first required such unions to prove their majority status in an election conducted by the Board, being satisfied to rely upon a check of membership cards, dues records, or other proof that they were the choice of the majority of the employees. A union seeking to supplant one of these uncertified bargaining

[67] S. 360, 80th Cong., 1st Sess., Sec. 13 (b) (2) (January 27, 1947).

representatives may call a strike for such purpose without violating Section 8 (b) (4) (C). This was the situation in the recent *Perry-Norvell Co.*, Case (9-CB-3) [80 NLRB 225], in which an uncertified union held a contract with the employer and another union struck for bargaining rights.

Present law in no way limits the primary strike for recognition except in the face of another union's certification. It has frequently been suggested that Section 8 (b) (4) (C) should be broadened to cover the situations where another union has been recognized, or has a contract, and where the striking union has failed to win recognition at the ballot box. A fairly good case can be made for such an amendment. It would not go as far as the suggestion prohibiting strikes for purposes for which the law provides an administrative remedy, for the union seeking bargaining rights in an unorganized shop might still strike for it. [Emphasis supplied.]

There are two factors which might be considered in connection with any further restrictions upon recognition strikes. The first is the time element involved in acquiring bargaining rights by the orderly procedure provided by the act. If the employer will not consent to an election, it now requires an average of 84 days to dispose of a representation case (hearings, p. 1138). It may be questioned whether or not the mere availability of an administrative remedy is sufficient to restrict the right to

strike. Perhaps the remedy should be prompt as well as available.

A second consideration arises out of the fact that Section 9 (c) (3) limits elections to one in a given year. A labor organization which loses an election and strikes for recognition the next day or the next week may be condemned for such action, but there may be equities militating against it having to wait a whole year. The situation may arise where some action by the employer, or a more successful organizing campaign, causes the union to acquire an overwhelming majority within a few weeks following an election in which it has been rejected by the employees.

The committee believes that further experience with the act is advisable before consideration is given to broadening Section 8 (b) (4) (C).

Thus far the experience of Congress has not led it to enlarge the scope of Section 8 (b) (4) (C).[68]

---

[68] In 1949, nothing came of an attempt to repeal Section 8 (b) (4) (A) and (B), by repealing the Taft-Hartley Act, and to enlarge the object forbidden by Section 8 (b) (4) (C), by amending the reinstated Wagner Act, to include compelling "an employer to bargain with a particular labor organization as the representative of his employees if another union is certified," or "the employer is required by an order of the Board to bargain with another labor organization," or "the employer is currently recognizing another labor organization . . . and has executed a collective-bargaining agreement with such other labor organization, and a question concerning representation may not appropriately be raised under Section 9 of this Act." S. 249, 81st Cong., 1st Sess.,

Thus, by interpreting the proviso in its relation to Section 8 (b) (4)(A) and (B), so as to forbid any strike except that engaged in by a majority union, respondent attributes to Congress an objective which it has purposely renounced.

The full implication of respondent's view is apparent when it is considered that it bans strike activity by unions, not only for organizational purposes, but for any purpose, unless the union possesses majority status entitling it to exclusive recognition. However, in the absence of a union possessing the status of exclusive representative, employees may, "even if . . . a minority," designate a union to represent and bargain for them and to make "fair contracts on their behalf." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236-238. The consequence of respondent's view would be to bar to such employees the benefits of strike pressure exerted by its chosen union in support of demands it may legally make, since the union is not an exclusive representative. Finally, apart from strikes over the negotiation and administration of "members only" contracts, employees without exclusive rep-

---

Sec. 8 (b) (1) (January 31, 1949). See also, S. Rep. No. 99, 81st Cong., 1st Sess., 59, 67-68, Minority Views, 29. Even this enlarged objective does not go so far as respondent would in his interpretation of Section 8 (b) (4) (A) and (B), for it still permits a recognition strike where a majority union, not certified or required by a Board order to be recognized, has no contract, or where its contract is nearing its expiration so that a challenge to its status is appropriate, or where there is no other union in the picture.

resentation frequently engage in work stoppages to back isolated demands of diverse character, sometimes under the sponsorship of unions [69] and sometime without conventional union assistance,[70] and in either posture their concerted activity is protected from employer retaliation. At the least, however, the consequences of respondent's view would be to outlaw all such work stoppages sponsored by unions which are not exclusive representatives, permitting only those stoppages in which employees engage unaided. Indeed, all such work stoppage may well be banned, for by associating themselves as a common group to present their joint demand backed by a concerted withholding of labor, employees constitute themselves a "labor organization" within the Act's meaning (*National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 818 (C. A. 3)),[71] and as such they may not

---

[69] *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717-718 (C. A. 8); *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633 (C. A. 2).

[70] *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (C. A. 3); *Gullett Gin Co* v. *National Labor Relations Board*, 179 F. 2d 499, 502 (C. A. 5), reversed on other grounds, Jan. 15, 1951; *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 843-844 (C. A. 4).

[71] Section 2 (5) of the Act defines a labor organization to mean "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

strike because the "labor organization" is not entitled to recognition. Clearly the proscription of such traditional strike activity was not within the contemplation of Congress.

Thus, respondent's interpretation of the proviso in its relationship to Section 8 (b) (4) (A) and (B) falls, for by displacing the criterion of secondary labor action with the test of majority union action, respondent changes the purpose of Congress and reaches results foreign to its aim.

2. The theory behind respondent's argument is that Section 8 (b) (4) (A) and (B) prohibits all strikes and associated inducement, for all forms of labor pressure in furtherance of a demand have the cessation of business as an objective (*supra*, p. 19 and n. 6); and that the only activity saved from this flat ban is that which falls within the exculpatory language of the proviso.[72] In effect, therefore, every strike called by a majority union is permitted, for the only test of legality prescribed by the proviso is that the strike be the authorized action of a union entitled to recognition. In consequence, even a secondary strike, so long as it is called by a majority union, would be proper. In

---

[72] As articulated by an exponent of the so-called proviso theory, Section 8 (b) (4) (A) covers "the rupture of *any* kind of business relationship," and "without the proviso's qualifications," it "prohibits all strikes and all inducements to strike." Petro, *The Enlightening Proviso*, 1 Labor Law Jour. 1075, 1076, 1078 (Nov. 1950).

this case, therefore, had a strike of the Sales House employees been called by a labor organization representing them in order to support the Union's recognition claim against Kaplan, the strike would be saved from the ban of Section 8 (b) (4) (A) and (B) by virtue of the proviso. The only way to avoid this patently unsound result is to imply a distinction between primary and secondary action.[18] Invocation of the proviso, therefore, cannot do away with the need for the distinction which respondent denies that Section 8 (b) (4) (A) and (B) permits.

3. The proviso is not a limitation on Sections 8 (b) (4) alone, but it attaches to all of Section (8) (b), including 8 (b) (1), (2), (3), (5), and (6), in addition to 8 (b) (4) (A), (B), (C), and (D). Since the proviso in terms has a latitude which extends to all of 8 (b), it is unreasonable to interpret the reach of subdivision 8 (b) (4) (A) and (B) exclusively by reference to qualifications which have a bearing on other subdivisions as well. Moreover, so to do distorts the usual function of an exculpatory proviso in that, instead of being an

---

[18] The words of the proviso, condoning "a refusal by any person to enter upon the premises of any employer (*other than his own employer*)," cannot serve rationally to distinguish between primary and secondary strikes. For employees who refuse to cross a picket line at their own employer's place of business, *i.e.*, engage in a primary strike, would be violating the Act; only employees who refuse to cross picket lines at premises other than their own employer's, would be protected by the proviso.

exception to a wrong already defined, the nature of the offense is not known until the proviso is reached. This is so because, if the only qualification upon the literal meaning of 8 (b) (4) (A) and (B) is that contained in the proviso, 8 (b) (4) (A) and (B), read alone, reaches all strikes and associated inducement, and no one supposes that Congress intended that such conduct should be, without more, a wrong. Cf. *United Automobile Workers* v. *O'Brien, supra.*

Reading the proviso as applicable to all of 8 (b), and not merely to subsection (4) (A) and (B), the proviso acquires a meaning in consonance with the normal sense of an exculpatory proviso. With respect to each of the dissimilar union unfair labor practices listed in the provisions of 8 (b), the function of the proviso is to define the circumstances under which, *assuming the strike or associated inducement to be otherwise unlawful by virtue of its conflict with those provisions alone,* it is nevertheless not unlawful for the employees of another employer to refuse to enter the premises of the struck employer. Until the strike or its inducement is otherwise determined to be illegal, recourse to the exculpatory aspects of the proviso is superfluous, and exploration of its substantive content is unnecessary.[74] In this case, since the Union's

[74] The Board has deliberately abstained from delineating the meaning of the proviso in its relationship to Section 8 (b) (4) (A) and (B), for the problems it raises are many, and, as in this case, their resolution has thus far been unnecessary to the interpretation of Section 8 (b) (4) (A) and

action did not offend Section 8 (b) (4) (A) and (B), it is immaterial that the Union did not meet the conditions prescribed by the proviso, for there is no occasion to reach it.

(B). *Interborough News Co.*, 90 NLRB, No. 297, 26 LRRM 1440; *Cyril de Cordovo & Bro.*, 91 NLRB, No. 187, 26 LRRM 1628, 1631. The ablest treatment of the proviso which we know is that of Trial Examiner Arthur Leff in the *Interborough* case, and without inferentially subscribing to the views there expressed, we set forth his discussion in Appendix B, *infra*, pp. 88-96, to illustrate the troubling character of the questions raised. Contrast also, Tower, *The Puzzling Proviso*, 1 Labor Law Journal 1019 (October 1950), with Petro, *Taft-Hartley and the "Secondary Boycott,"* 1 Labor Law Journal 835 (August 1950), and *The Enlightening Proviso*, 1 Labor Law Journal 1075 (November 1950). It is unnecessary also for the purposes of this argument to define the full affirmative significance of the proviso; it is necessary only to show, as we have done, *supra*, pp. 66-80, that it cannot have the import which respondent attributes to it.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below be reversed, insofar as it holds that the Union's conduct towards the employees of Sales House violates Section 8 (b) (4) (A) and (B) of the Act.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

BERNARD DUNAU,
Attorney,
National Labor Relations Board.

FEBRUARY, 1951.

APPENDIX A

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141 *et seq.*), are as follows:

* * * * *

SEC. 2. When used in this Act—

* * * * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

SEC. 8. * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees

in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

* * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object therof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another

labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * * *

SEC. 10. * * *

* * * * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate tem-

porary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining orders as it deems just and proper.

* * * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such

temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

* * * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * * * * *

APPENDIX B

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Case No. 2-CC-103

In the Matter of
NEWSPAPER AND MAIL DELIVERERS' UNION
OF NEW YORK AND VICINITY
and
INTERBOROUGH NEWS COMPANY

* * * * * *

INTERMEDIATE REPORT

* * * * * *

Directly involved in this case is the question of how the proviso to 8 (b) (4) is to be construed. For, if, as the Respondent urges, the proviso excepts from the scope of 8 (b) (4) (A) the particular conduct of which the General Counsel here complains, that, alone, would be dispositive of the case. And it would make it unnecessary to decide whether, absent the proviso, the conditions necessary to spell out a violation of Section 8 (b) (4) (A) have been met by the facts found. The problem of decision in this case is not a simple one. The exact meaning of the terms used in the proviso is somewhat obscured, at least at first blush; and so, too, is the precise relationship of the proviso to the general prohibitory legislative language to which it is addressed. And there are to date no

Board or Court interpretations of the proviso to provide guidance.[17]

The meager legislative history casts some light on the proviso, but not enough completely to illumine. The Committee Reports contain but one specific reference to the proviso, the debates none. That single reference is to be found in the Senate Committee Report, where it is said:[18]

> Attached to section 8 (b) (4) is a proviso clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strike breaking activities would not be deemed an unfair labor practice unless the strike is a "wildcat" strike by a minority group.

In seeking the Congressional intent, it is helpful to begin by adverting briefly to some basic principles of statutory construction. Thus, it is an elementary rule that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative and superfluous, and so that one part will not destroy another unless the provision is the result of obvious mistake or error."

---

[17] The only case which thus far has reached the Board where the proviso may have been involved is *Matter of Oil Workers International Union* and *The Pure Oil Company*, 84 N. L. R. B., No. 38. That case, however, was decided upon different grounds, and the proviso was referred to only in the dissent.

[18] Sen. Rept. No. 105, 80th Cong., 1st Sess., p. 23.

(Sutherland, *Statutory Construction*, 3d ed. § 4705) The particular inquiry must be directed not to the abstract force of the words but to the sense in which they were intended to be used in the Act. (*Ibid*, § 4706) Where legal terms are used in a statute, they are presumed to have been used in their legal sense. (*Ibid* § 4919) "There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts." (*Duparquet* v. *Evans*, 297 U. S. 216, 218)

Perhaps the best approach to the problem is to examine, in the light of its reasonableness and compatibility with the principles set out above, each of the possible interpretations of the proviso that has been argued or suggested. There are three:

1. The first—representing the position taken by the General Counsel in his brief—is that Congress was thinking merely of personal rights, and not rights of labor organizations, when it used the term "person" in the proviso, and that it intended nothing more by the proviso than to reaffirm the right of an employee as an individual to refuse to enter upon the premises of an employer against whom ratified or approved strike action has been taken by an exclusive bargaining representative. To support this view, the General Counsel relies in his brief upon a single argument. Because—he argues—the proviso uses the words, "other than his own employer," and because labor organizations do not have "employers", it follows that only individual rights could have been contemplated. In short, the General Counsel would interpret the proviso by giving literal, abstract force to certain

words used, without reference to the special sense in which the words were intended to be used in the Act, and without regard to "the structure of the statute, and the relation physical and logical" between the proviso and the section of the Act to which it is attached. By this approach the General Counsel is able in his brief to ignore Section 2 (1) of the Act, which defines "person" as including, *inter alia*, "labor organizations." And he is able also to overlook that where Congress elsewhere in the statute evinces an intent to reaffirm individual rights, it speaks in terms, not of a "person", but of an "individual employee.' [19]

The General Counsel's proposed interpretation fails to meet the test of close scrutiny in other respects as well. Thus, if in fact it was Congress' intent simply to reaffirm fundamental individual rights, and nothing more, no reason appears why it should have confined application of the proviso exclusively to situations involving authorized strikes by majority representatives. In terms of fundamental personal rights, as distinguished from legally protected concerted action, the "lawful" right of a person *as an individual* to refuse to enter upon struck premises is no less where the strike is a "wildcat" one than where it is an approved one; it is no greater where the strike is by a union

---

[19] See Section 502, Labor Management Relations Act, 1947:

> Nothing in this Act shall be construed to require an *individual employee* to render labor or services without his consent, nor . . . make the quitting of his labor by an *individual employee* an illegal act; nor shall [Court process issue] to compel the performance by an *individual employee* of such labor or services . . . (Emphasis supplied.)

entitled to exclusive recognition than where it is by a union that is not. Congress must be assumed to have been aware of this when it enacted the statute. Moreover, the General Counsel's proposed interpretation fails to explain on a rational basis the purpose of linking the proviso to a subsection of the Act which neither restricts rights nor defines obligations of employees *as individuals*. The only thing made "unlawful" under Section 8 (b) (4) is for a *labor organization* or *its agents* to engage in certain defined unfair labor practices.[20] If any interference is warranted, therefore, it is that Congress intended to relate "unlawful", as used in the proviso, to "unfair labor practice," as used in the text of the subsection of which it is part, and to equate those terms. That such was indeed Congress' intent is proved by such legislative history as appears in that point. It is made particularly apparent in the Senate Committee's explanation of the proviso, quoted above, wherein it

---

[20] The general body of Section 8 (b) (4) does not, to be sure, use the term "unlawful." However, Section 303, the companion section of the Labor Management Relations Act, 1947, which provides for damage suits, uses that term in lieu of "unfair labor practice." That section discloses on its face that the conduct referred to therein is to be deemed "unlawful, for the purposes of this section only." In the course of the Senate debates, Senator Taft, a sponsor of the legislation made it clear that he equated "unfair labor practice" as used in Section 8 (b) (4) with "unlawful" as used in Section 303, and that the only purpose in making the change in terminology was so "that a suit for damages could be brought for this kind of thing." Senator Taft also noted, that "this amendment [Section 303] deals with labor organizations and the *only unlawfulness is for a labor organization to do something*" (93 Cong. Rec. 5060-5063; emphasis supplied).

is explicitly pointed out that the proviso was intended to make clear, for example, that a refusal to cross a picket line "would not be deemed an *unfair labor practice.*"[21] The contrary interpretation suggested by the General Counsel can be reached only by reading the proviso as if it existed in a vacuum rather than as an integral part of Section 8 (b) (4), by ignoring the statutory definition of the term "person," and by giving the term "unlawful" a sense different from that which Congress intended it to possess. Acceptance of the General Counsel's interpretation would leave the proviso devoid of any real meaning or effect, and render it wholly superfluous to the statutory scheme. It is not reasonable to suppose that such was Congress' purpose or intent.

2. It has also been suggested, although not by the General Counsel, that the term "unlawful" in the proviso should be interpreted as being synonymous with unprotected concerted activity. This interpretation would hold that the proviso should be read as protecting employees from reprisal action at the hands of their employer for engaging in the particular form of concerted activity therein described; but not as exculpating a labor organization, as such, from liability for engaging in like activity, or for inducing or encouraging employees to do so. The unreasonableness of this construction is readily demonstrable. Like the proposed construction of the General Counsel previously considered, it fails to give due consideration to "the structure of the statute and the relation, physical and logical between its several parts"—more par-

[21] And see, too, the preceding footnote.

ticularly, to the fact that the proviso is attached to a subsection of the Act concerned primarily with union unfair practices, and not, except perhaps derivatively, with employee rights protected by Section 7. Besides, it clothes the term "unlawful" with a sense different from that which, as the legislative history indicates, Congress intended that term to possess. Moreover, acceptance of this suggested construction would lead to curious, if not absurd results. Thus for example, individual employees, who in an appropriate situation had agreed among themselves not to enter upon the premises of a struck employer, not their own, would be acting in protected concert; but if the same individuals, organized into a union, had undertaken like action at an official union meeting, so as to make their action union action, their union would be guilty of an unfair labor practice. Surely, in the absence of clear evidence to the contrary —and there is none whatever—this may not reasonably be taken to have been Congress' intent.

3. The third view—and the one I believe to be correct—is that the proviso was designed to restrict the generality of Section 8 (b) (4) (A), by excluding from the forms of concerted activity proscribed by that section, the particular type of activity which the proviso defines. This construction is in harmony with the wording of the proviso —if its key words are read, not in the abstract, but in their legal sense as used in the statute and in context with the general language of Section 8 (b) (4) (A). Thus, for reasons previously stated, the term "unlawful" in the proviso is to be equated with "unfair labor practice." The term "refusal" in the proviso must be viewed as related to "con-

certed refusal" in the body of Section 8 (b) (4); for that is the only form of refusal with which the section is concerned. The term "person" is to be read, in accordance with the statutory definition, as including "labor organization"; and within that term would also fall employees for whose concerted activity a labor organization normally would be responsible, because of acts of inducement and encouragement on its part. The phrase "premises of any employer (other than his own)," considered in context with Section 8 (b) (4) (A), is reasonably to be construed as having been designed solely to identify the premises referred to as that of the "any other producer, processor or manufacturer" or of the "any other person" of whom 8 (b) (4) (A) speaks—in short, the premises of the employer involved in the primary dispute in a secondary boycott situation which, but for the proviso might otherwise be construed to fall within the ban of 8 (b) (4) (A).

When the terms of the proviso are read in their statutory sense and in contextual relationship to the entire section, the conclusion seems almost unavoidable that the purpose of the proviso was to make clear that Congress intended to exclude from the reach of Section 8 (b) (4) (A) the narrow form of concerted activity which the proviso defines. The care with which Congress circumscribed the proviso—confining its scope to concerted action localized at the place where primary picketing and other direct strike activities normally occur,[22] and

[22] Cf. *Matter of Oil Workers International Union, Local Union 346 (CIO)* and *The Pure Oil Company, supra; Matter of United Electrical, Radio and Machinery Workers of America* and *Ryan Construction Corporation*, 85 N.L.R.B., No. 76.

further limiting its application only to situations involving approved strikes—lends added support to this conclusion. Unlike the other suggested interpretations above considered and rejected, the construction of the proviso here found to be correct is entirely consistent with—indeed it is reinforced by—the legislative history adverted to above. Unlike the others, it achieves, a logical concord between the proviso and the balance of the section of which it is part. And it alone gives rational meaning and operative effect to the provisions of the proviso, without otherwise creating conflicts in the statutory scheme.

* * * * *

Dated at Washington, D. C., this 29th day of November 1949.

[s] ARTHUR LEFF
Trial Examiner

☆ U. S. Government Printing Office: 1927035/804